Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

SANDRA LEA BENEDICT,

Petitioner,

v.

EAU CLAIRE PUBLIC SCHOOLS,
WISCONSIN EDUCATION ASS'N COUNCIL,
THOMAS BLOUNT, MICHAEL BURKE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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132 pp

QUESTIONS PRESENTED FOR REVIEW

Whether the Supreme Court honors request pursuant to Rule 15(a) that leave of Court be obtained for the amendment of pleadings, in such situations "leave shall be freely given when justice so requires" and "this mandate is to be heeded," as in the Supreme Court in Forman v. Davis (1962).

Whether the federal doctrine of equitable tolling applies in a civil rights action under 42 U.S.C.A. §1983 when a borrowed state statute of limitations does not toll the statute during periods of incompetency or disability and not following the state statute will defeat the goals of §1983 and effectively deprive a claimant, who is mentally incompetent or disabled and has no understanding of her cause of action, of any opportunity to seek redress for constitutionally protected civil rights, and the strict adherence to the anti-tolling provision of the borrowed state statute of limitations contradicts all other state/territorial tolling provisions and therefore will violate the uniform application of statutes of limitations in civil rights cases.

Whether federal courts apply the borrowed state statute of limitations for personal injury actions in a 42 U.S.C.A. §1983 case, according to the federal common law and by not following the state statute will defeat the goals of §1983 and effectively deprive the claimant, who is disabled, of any opportunity to seek redress for deprivations of her United States Constitutionally protected civil rights and the strict adherence to the anti-tolling provision of the borrowed state statute of limitation contradicts all other state/territorial tolling provisions and therefore will violate the uniform application of statutes of limitations in civil rights cases.

Whether Federal Jurisdiction for removal of ERD (Equal Rights Division) State Claims to Federal Court Jurisdiction: citation: 28 U.S.C. §§1441-1450, Removal Statute, since it is a general rule under the Federal Anti-injunction Statutes that Federal District Courts are prohibited from granting injunctions to stay proceedings in any state court (28 U.S.C.A. §2283).

Whether Federal Jurisdiction applies in a civil rights action interfering with the protected rights of the claimant for filing a charge or participating in any manner in EEOC hearings, ERD hearings, investigations, or other proceedings under the ADA, Title VII of the Civil Rights Act or the Equal Pay Act or proceedings under the laws enforced by EEOC as well as claimant's asserting rights under fair employment law for open records of Title I expenditures and making complaint to the U.S. Department of Education Inspector General, Washington, D.C. According to the case of Title VII and the ADA, as a statutory prerequisite for its investigations and proceedings, 42 U.S.C. §2000e-5(b; incorporating Title VII procedures. Under the ADEA and EPA, the Commission is empowered to investigate without a charge, 29 U.S.C. §626(a (ADEA) and 29 U.S.C. §211 of the Fair Labor Standards Act (FLSA).

Whether Congress enacted provisions barring retaliation in each of the statutes enforced by the Commission in large part to ensure that employees remain free to report suspected violations to the government.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Seventh Circuit.

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OPINIONS BELOW

The February 10, 1998 Judgment Order of the Seventh Circuit Court of Appeals, whose judgment is herein sought to be reviewed, is at No. 97-2513, is unpublished and is reprinted in Appendix A to this Petition ("Appendix A") at pp. A2. The Order of March 5, 1998 of the Seventh Circuit Court of Appeals for denial of rehearing is reprinted in Appendix A at p. A22. The Order of March 6, 1998 of the Seventh Circuit of Appeals for denial of Motion for Stay of Mandate is reprinted in Appendix A at pp. A23. The prior, Memorandum and Order of the Honorable John C. Shabaz of the United States District Court for the Western District of Wisconsin, entered March 19, 1996 at No. 95-C-568-S, is reprinted in Appendix A at pp. A31. The prior April 24, 1996 Memorandum and Order of the Honorable John C. Shabaz of the United States District Court for the Western District of Wisconsin at No. 95-C-568-S is reprinted in Appendix A at pp. A37. The prior October 2, 1996 Order of the Honorable John C. Shabaz of the United States District Court for the Western District of Wisconsin at No. 95-C-568-S is reprinted in Appendix A at pp. A40. The prior May 7, 1997 Order of the Honorable John C. Shabaz of the United States District Court for the Western District of Wisconsin at No. 95-C-568-S is reprinted in Appendix A at pp. A42. The June 17, 1997 Order of the Honorable John C. Shabaz of the United States District Court for the Western District of Wisconsin at No. 95-C-568-S is reprinted in Appendix A at p. A44. The December 5, 1996 Decision and Order of the Honorable John L. Brown, Administrative Law Judge for the State of Wisconsin, Department of Workforce Development, Equal Rights Division at ERD Case No. 199504328 and EEOC Case No. 260960026 is reprinted in Appendix A at pp. A46, along with attached Certification of the Hearing Section, Equal Rights Division, p. A55. The March 20, 1998 Order of the Honorable Jerome J. Berkowitz, Administrative Law Judge for the Social Security Administration, Office of Hearings and Appeals is reprinted in Appendix A at p. A56.

JURISDICTION

The Judgment Order of the Seventh Circuit court of Appeals was entered on February 10, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1291. The United States District Court for the Western District of Wisconsin had subject matter jurisdiction under 28 U.S.C. §1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action was filed pursuant to 42 U.S.C.A. §1983 on the basis that in addition to deterrence, the second federal policy underlying §1983 Civil Rights actions is compensation for the victim who has suffered a violation of his/her Civil Rights. Federal courts, according to federal common law, apply the borrowed state statute of limitations for personal injury actions in a §1983 case. Wisconsin had explicit statutory provisions which toll the statute of limitations during periods of incompetency or disability. (See Appendix A at p. A57.)

This action was also filed pursuant to the Fourteenth Amendment of the United States Constitution and the Rehabilitation Act, 29 U.S.C.A. §794. The pertinent sections of these constitutional and statutory provisions are set forth in the Appendix A at p. A57.

This action was further filed pursuant to the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 et. seq. and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 et. seq. The pertinent sections of 29 U.S.C.A. §623(a)(1), 29 U.S.C.A. §623(d), 42 U.S.C.A. §12102(2), 42 U.S.C.A. §12111(8), 42 U.S.C.A. §12111(9), 42 U.S.C.A. §12111(10)(A), 42 U.S.C.A. §12112(a), 42 U.S.C.A. §12112(b)(5), and 42 U.S.C.A. §12203(a), of these constitutional and statutory provisions are set forth in the Appendix A at p. A57.

STATEMENT OF THE CASE

A. Statement of Facts

Petitioner alleges that she was the victim of a continuing pattern and practice of discrimination perpetuated against her by her employer, Eau Claire Public Schools, and her SEAC Labor Union, as represented by Thomas Blount, Union President and Michael Burke, NUE Attorney for WEAC Labor Union. Petitioner claims that defendants have discriminated against her on the basis of her disability and age with respect to the terms, conditions, and privileges of her employment and labor organization membership as prohibited by the Americans with Disabilities Act ("ADA") 42 U.S.C. §12101 et. seq. and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 et. seq., as well as disciplining or treating her more harshly and retaliating against her due to her handicap for filing a complaint against Eau Claire Public Schools previously for being treated less favorably than others because of her protected class in reference to discrimination in layoff/firing, job assignments, leave or benefits and training.

Petitioner strongly believes that she was retaliated against for asserting her rights under fair employment law for open records of Title I expenditures and making complaint to the U.S. Department of Education Inspector General, Washington, D.C.

Petitioner alleges that her employer Eau Claire Public Schools interfered with her rights as their employee to file a charge or to participate in EEOC hearings, ERD hearings, investigations, or other proceedings under the ADA, Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, or the Equal Pay Act. These are non-waivable rights built upon the premise that (a) interference with these protected rights is contrary to public policy; and (b) the anti-retaliation provisions of the civil rights statutes

prohibit such conduct. This enforcement guidance set forth the EEOC's position that an employer may not interfere with the protected right of the employees to file a charge or participate in any manner in an investigation, hearing, or proceeding under the laws enforced by EEOC.

B. Procedural History

Petitioner filed a complaint pro se in the Western District of Wisconsin on August 8, 1995, pursuant to the American with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA). Petitioner alleges that Respondents of Eau Claire Public Schools and WEAC Labor Union violated her civil rights by discriminating against her in terms and conditions of her employment on the basis of her medical disability and age.

On December 14, 1995 Respondent moved to dismiss Petitioner's claims. On January 1, 1996 U.S. Western District Court denied Respondent's motion to dismiss Petitioner's claims under ADA and ADEA in court order dated January 22, 1996. On February 8, 1996 Respondent filed motion for summary judgment. On February 12, 1996, Petitioner contacted Attorney Arellano who agreed to represent her in this action.

Attorney Arellano concluded upon review of all documents that Petitioner had not engaged in any formal discovery in this matter and that litigation would require substantial time and preparation. Attorney Arellano submitted that an extension of time must be granted in order to allow Petitioner an opportunity to combat Respondent's Motion for Summary Judgment and that a continuance be granted to allow Petitioner time to prepare for trial with assistance of counsel. Since Attorney Arellano's withdrawal from counsel, review of all the documents indicates that formal discovery was not taken by Attorney Arellano of any Respondents other than WEAC

Union's President Thomas Blount and NUE WEAC Attorney Michael Burke.

Petitioner needed to engage in substantial discovery including the exchange of interrogatories, the request for production of documents including medical records, and the taking of depositions in order to oppose Respondent's motion. Attorney Arellano never did any depositions for ERD State Hearing nor were depositions taken of any medical doctors, only WEAC Union President Thomas Blount and NUE Attorney Michael Burke, which was requested by WEAC Labor Union Attorney John Finerty.

Respondent Eau Claire Public Schools as well as Respondent's Blount and Burke moved for summary judgment prior to Petitioner's being able to offer certain specific facts showing discrimination without information and testimony regarding Petitioner's Automobile Accident of September 25, 1986.

Respondent Eau Claire Public Schools and Respondents Blount and Burke as represented by WEAC Labor Union moved for Summary Judgment prior to providing these records which would have substantiated employment discrimination claims as well as ADA and ADEA claims.

Petitioner has proven that she is disabled within the meaning of the ADA as substantiated by case before the Administrative Law Judge on January 21, 1998 issuing a fully favorable determination finding Petitioner disabled since March 21, 1997. This determination dated January 21, 1998 stands as a final decision of the Secretary.

Petitioner has proven that she is disabled within the meaning of the ADA and that she has met her threshold burden by establishing that she has an impairment which significantly limits any of her major life activities. Specifically, under the rule of Roth, Petitioner has proved that she has a physical

and/or mental disability which substantially limits one or more of her major life activities; a record of such an impairment; and that others regard her as having such an impairment. "Major life activities" are defined as "functions, such as care for oneself, performing manual tasks, walking, seeing, speaking, breathing, learning, and working." The term "substantially limits" means that the individual is either unable to perform, or significantly restricted as to the condition, manner or duration under which the individual can perform, a major life activity as compared to an average person in the general population.

In addition, in every respect to incidents where Petitioner was involved, the Respondent refused to adequately accommodate Petitioner's disability, but accommodated other teachers in similar positions. Respondent refused to assign Petitioner to positions which she was qualified for and which would have accommodated her disabilities and, then, instead assigned these positions to less qualified, less senior and younger (less than 40 years old) teachers.

The Petitioner's argument in previously submitted Petitioner's Brief has proved that (1) Petitioner is disabled within the meaning of the ADA, and (2) Respondent discriminated against her unlawfully on the basis of her disability and age, and therefore, is liable for all of the damages she is entitled to under the law, together with court costs and attorney's fees.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted To Resolve An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Honorable Court.

Pursuant to Rule 15 (a) a party may amend pleadings "once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which responsive pleading is permitted and the action has not been placed upon the trial calendar. An amended complaint may be filed without seeking leave of court or agreement of counsel. An opportunity to TEST claims on the Merits of the underlying facts and circumstances may be a proper subject of relief.

Rule 15(a)'s provision for amendment of pleadings prior to trial provide an offer up of evidence for trial purposes. Since the statute of limitations has run on Petitioner's motor vehicle accident of September 25, 1986 claim, the Petitioner can show in an amended complaint that the new claim relates back to the date of the original complaint.

In Rule 15(c)(1) an amendment relates back to the date of the original pleading if "relation back is permitted by the law that provides the statute of limitations application to the action."

In Rule 15(c)(2), the claim or defense "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."

In Rule 15(d), provision is made for Supplemental Pleadings. Petitioner requests amendments of pleadings to rectify errors and permit changes of her claims. These Supplemental pleadings would permit Petitioner to assert events that have occurred since the filing of the original pleadings such as

medical, disability interfering with employment, as substantiated by Social Security Disability Approval.

The Defense of Laches in a suit for Specific Performance is to be considered wholly independent of the Statute of Limitations.

The assertion of a claim under 28 U.S.C. §1331 may permit the court to exercise Supplemental Jurisdiction over related claims pursuant to 28 U.S.C. §1367.

II. Certiorari Should Be Granted To Resolve An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Honorable Court.

A borrowed state statute of limitations for a federal civil rights action, pursuant to 42 U.S.C.A. §1983, must be tolled in this case of egregious abuse under the federal equitable tolling doctrines that are available to the Court, because in failing to do so, the Court will effectively deny incompetents or the disabled any remedy for violation of their federal civil rights. This is a matter of first impression before this Honorable Court. However, this Honorable Court has previously stated that:

> When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so. Wilson v. Garcia, 471 U.S. 261, 266, 105 S.Ct. 1938 (1985).

This Court has further held that "Courts are to apply state law only if it is not 'inconsistent with the Constitution and laws of the United States.'" Garcia at 268-271. In addition, this Honorable Court has also held that,

> State Legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 367 (1977).

Congress intended that "gaps in federal civil rights acts should be filled by state law," Hardin v. Straub, 490 U.S. 536, 538, 109 S.Ct. 1998, 2000 (1989), but only "as long as the law is not inconsistent with federal law" and does not defeat §1983's "chief goals of compensation and deterrence." Id. at 538-39, 109 S.Ct. at 2001. See also Board of Regents v. Tomanio, 446 U.S. 478, 64 L.Ed.2d 440, 100 S.Ct. 1790 (1980).

The second federal policy underlying §1983 Civil Rights actions in addition to deterrence is compensation for the victim who has suffered a violation of her civil rights. In the present case, Petitioner has suffered permanent injuries from an automobile accident of September 25, 1986. According to the federal policies underlying §1983, Petitioner should be compensated for suffering these constitutional deprivations. If this Honorable Court does not toll the statute of limitations, the Petitioner will not only have suffered egregious abuse, but she will also be denied her federal rights under the United States Constitution.

Wisconsin does toll its statute of limitations for incompetency or disability. (See statutory provisions, Appendix A at p. A61.) Therefore, Wisconsin does not deprive incompetent or disabled any opportunity to vindicate their civil rights.

A body of state tolling law that lacks a provision for equitable tolling is inconsistent with the provision of a complete federal remedy under §1983 and therefore should be overridden by the federal equitable tolling doctrine.

III. Certiorari Should Be Granted To Guarantee A Uniform Application Of §1983 In Actions Involving Incompetents or Disabled.

This Court has a well established tradition of protecting the uniform application of borrowed state statutes of limitations in §1983 actions. Wilson v. Garcia, 471 U.S. 261, 275, 105 S.Ct. 1468, 64 L.Ed.2d 15 (1980). According to the federal common law, federal courts apply the borrowed state statute of limitations for personal injury actions in a §1983 case. Wilson at 279. This system is intended to guarantee the uniform application of such statutes of limitations. This Honorable Court has stated:

> (The) federal courts may ... fashion their own limitations periods whenever a state statute of limitations threatens a federal program's need for uniformity. Eubanks v. Clarke, 434 F.Supp. 1022, 1031 (E.D. Pa. 1977) citing United Auto Workers v. Hoosier-Cardinal Corp., 383 U.S. 696, 86 S.Ct. 1107 (1966).

Wisconsin has explicit statutory provisions which toll the statute of limitations during periods of incompetency or disability. (See Appendix A p. A61.)

Since the Petitioner resided in Wisconsin, her ability to vindicate her civil rights would be protected during her incompetency or disability. The protection of the disableds' civil rights during periods of disability does result in the uniform application of federal civil rights law and does not defeat §1983's chief goals of deterrence and compensation.

If the United States Supreme Court does not grant Certiorari, it will effectively deny Petitioner her Constitutional and Civil Rights. It is incomprehensible that the Court would refuse to exercise its federal equitable tolling powers to avoid this unjust result. Such an outcome would directly contradict the decision in Wilson v. Garcia, supra, where the Supreme Court of the United States quite clearly recognized the need for uniformity in statute of limitations questions in dealing with §1983 actions.

Petitioner contends that this Honorable Court should not condone such a blatant discrimination and the resulting lack of uniformity which would result by failing to equitably toll Wisconsin's statute. The Supreme Court in Wilson v. Garcia, supra, sought to bring §1983 actions into a state of uniformity in the application of statutes of limitations. In determining how to apply the state statutes of limitations, the Supreme Court stated,

> When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so. Wilson, at 266.

The Supreme Court further stated, "Courts are to apply state law only if it is not inconsistent with the Constitution and laws of the United States." Wilson, at 266.

In the opinion of this Honorable Court in Wilson, supra, it is clear that federal courts seek uniformity in the application of the borrowed state statutes of limitations. The Court determined in Wilson, supra, that uniformity could be achieved by applying the state's personal injury statutes of limitations to all §1983 actions.

This Honorable Court should grant Certiorari to promote uniformity in the application of the borrowed state statutes of limitation.

IV. Certiorari Should Be Granted To Resolve A Conflict Between United States Courts of Appeals On The Same Important Matter.

The Seventh Circuit Court of Appeals affirmed the decision of the Western District Court of Wisconsin which adopted the opinion of Judge John C. Shabaz, and by doing so, failed to apply the federal doctrine of equitable tolling in §1983 Civil Rights Actions. As such, the Seventh Circuit decision directly conflicts with the decision of the Seventh Circuit of Appeals in Heck v. Humphrey, 997 F.2d 355 (7th Cir. 1993) cert. granted, U.S., 114 S.Ct. §2364 (1994). In Heck, the Seventh Circuit recognized that,

> ... the Supreme Court has held that state, not federal, tolling provisions apply to state statutes of limitations borrowed for §1983 suits. Heck at 358 (citing Tomanio and Hardin).

The Seventh Circuit determined that:

> Neither Tomanio nor Hardin, however, dealt with a situation in which a federal tolling doctrine was essential to the vindication of federal rights. Congress ... intended that "gaps in federal civil rights acts should be filled by state law," Hardin v. Straub, supra, 490 U.S. at 538, 109 S.Ct. at 2000, but only "as long as that law is not inconsistent with federal law" and does not defeat §1983's "chief goals of compensation and deterrence." Id. at 538-39, 109 S.Ct. at 2001 ... it follows that a body of state tolling law that lacks a provision for

> equitable tolling is inconsistent with the provision of a complete federal remedy under §1983 and therefore is overridden by the federal doctrine. Heck at 358.

On Petition for Certiorari, the Supreme Court indicated that the Seventh Circuit Court of Appeals "concluded that a federal doctrine of equitable tolling would apply to the 1983 cause of action" under the facts of that case. Heck at S.Ct. 2373. The Supreme Court decision stated that the Seventh Circuit Court of Appeals distinguished the Supreme Court cases holding that state, not federal, tolling provisions apply in §1983 actions. The Supreme Court did not indicate that the Seventh Circuit Court of Appeals was incorrect in applying the federal equitable tolling principle or that it was improper to distinguish the Supreme Court decisions. The Supreme Court comments, although only dicta, could be interpreted in a manner which would recognize the application of the federal doctrine of equitable tolling in §1983 actions under the present circumstances. The Supreme Court has not provided direct guidance on this issue, since this was dicta and not part of the holding of the case. Therefore, the conflict between the Courts of Appeals continues to exist. Certiorari should be granted to resolve this conflict.

V. Certiorari Should Be Granted To Resolve An Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Honorable Court.

Petitioner's Attorney Victor Arellano motioned ERD (Equal Rights Division) to Stay the Proceedings and place the ERD hearing in abeyance dated October 23, 1996. Administrative Law Judge John Brown rendered a Decision and Order dismissing, with prejudice, ERD Case No. 199504328 and EEOC Case No. 260960026 in the action of Sandra Lea Benedict v. Eau Claire Public Schools on grounds of res judicata.

The Doctrines of Res judicata and Collateral Estoppel apply to arbitration awards and (1) under the rules of res judicata, a valid and final award by arbitration has the same effects and is subject to same qualifications and exceptions as a judgment of a court. (2) If a scheme of remedies permits assertion of the second claim notwithstanding the award regarding the first claim, then an award by arbitration with respect to a claim does not preclude relitigation of the same or a related claim based on the same transaction. (3) An issue determined in arbitration does not preclude relitigation of the issue if: (a) The issue determined in arbitration with a preclusive effect would be incompatible with contractual provision or legal policy that the tribunal in which the issue subsequently arises be free to make an independent determination of the issue/issues in question or with purpose to specially expedite arbitration agreement. (b) The elements of adjudicatory procedure prescribed in §83(2). (4) The extent to which the award has conclusive effect is determined in accordance with that limitation, if the terms of agreement to arbitrate limit the binding effect of the award in another adjudication or arbitration proceeding.

Under Title VII of the 1964 Civil Rights Act the Fair Labor Standards Act and 42 U.S.C. §1983, the Supreme Court has limited the claim and issue preclusion effects of arbitral awards where an employee's federal statutory rights have been implicated.

In Alexander v. Gardner-Denver Co. 1974, the Court considered the preclusive effect of an arbitral award regarding an employee's statutory right to a trial de novo under Title VII. Gardner-Denver's motion for summary judgment holding that the employee was bound by the prior arbitral decision and had no right to sue under Title VII was granted by the district court. The Court of Appeals affirmed this decision. However, the Supreme Court reversed and declined to adopt a preclusion rule on the theory stating that the employee was not seeking

review of the arbitrator's decision but was asserting a statutory right "independent" of the arbitration process.

Justice Powell stated that arbitration procedures are "inappropriate" to resolve Title VII rights but are well suited to resolve contract disputes. In resolving Title II claims, arbitration was considered inferior to the judicial process because of the familiar list of arbitration deficiencies:

The specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land.

Authorities omitted the fact-finding process in arbitration usually is not equivalent to judicial fact finding.

The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply, and discovery, compulsory process, cross examination, and testimony under oath which are the rights and procedures common to civil trials are often severely limited or unavailable.

The Supreme Court in Barrentine v. Arkansas-Best Freight System, Inc. (1981) again declined to defer to an arbitral decision where an employee's claim which regarded a statute designed to provide minimum protections to individual workers based on rights from the Fair Labor Standards Act (FLSA).

Two rationales were offered by the Court to support its denial of preclusion in the case. First, even if the employee had "meritorious claims," her labor union might not support the claim strongly in arbitration. Second, statutory rights might still not be adequately protected even assuming the union fairly presents the employee's claim.

Arbitrators could issue rulings that were against the public policy underlying the FLSA (Fair Labor Standards Act), since they must follow the intent of the parties, rather than enforce the statute.

In McDonald v. City of West Branch (S.Ct. 1984), the Supreme Court relied on Alexander v. Gardner-Denver Co. and Barrentine v. Arkansas-Best Freight System, Inc. and denied preclusive effect to an unappealed arbitration award in an action arising under 42 U.S.C. §1983. A discharged police officer (Gary McDonald) filed a grievance pursuant to collective bargaining agreement between the City of West Branch and the union, contending "No proper cause existed for his discharge." Petitioner was also improperly discharged from her Randall School Title I teaching position. The grievance resulted in arbitrator ruling against McDonald, subsequently filed action under 42 U.S.C.A. §1983 alleging he was discharged for exercising his First Amendment Rights. A jury returned verdict against Chief of Police which then was reversed by Court of Appeals. Court of Appeals stated arbitration process had not been abused and McDonald's First Amendment claims were barred by res judicata and collateral estoppel. Petitioner's EEOC/ERD claims were also barred by res judicata for improper Randall School discharge.

The Supreme Court reversed the Court of Appeals stating four reasons why judicial disputes resolution was superior or preferable to arbitration in 42 U.S.C.A. §198(d)(3) cases.

(1) Arbitrator may not have expertise to resolve complex legal questions.

(2) Arbitrator's authority is derived solely from contract and may not have authority to enforce §1983, 42 U.S.C.A.

(3) Arbitrator may not vigorously present employee's case in arbitration.

(4) Arbitral fact-finding is less comprehensive than judicial fact-finding.

In §35.01, the Americans with Disabilities Act (ADA) will invoke the procedures provided in Title VII regarding complaints of discrimination.

In Consolidated Rail Corp. v. Darrone (S.Ct. 1984), there is an implied private right of action under Title VII and jury trial may be available. Smith v. Barton (9th Cir. 1990).

VI. Certiorari Should Be Granted To Resolve An Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Honorable Court.

Standards for Title I of the ADA and Section 504 of the Rehabilitation Act are for the most part identical because Title I of the ADA was based on requirements set forth in regulations implementing Section 504.

Petitioner alleges that her employer Eau Claire Public Schools interfered with her rights as their employee to file charges or to participate in EEOC hearings, ERD hearings. investigations, or other proceedings under the ADA, Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), or the Equal Pay Act, which are non-waivable rights. This premise is built on the fact that (a) interference with these protected rights is contrary to public policy; and (b) the anti-retaliation provisions of the civil rights statutes prohibit such conduct. This enforcement guidance set forth the EEOC's position that an employer may not interfere with the protected right of employees to file a charge or participate in any manner in an investigation, hearing, or proceeding under the laws enforced by EEOC.

Title VII provides that: it shall be an unlawful employment practice for an employer to discriminate against any of his/her employees or applicants for employment, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he/she has opposed any practice made an unlawful employment practice by title, or because he/she has made a charge, testified, or participated in any manner in an investigation, proceeding, or hearing under this title.

The Supreme Court held that this section extends protection to former employees according to 42 U.S.C. §2000e-3, in Robinson v. Shell Oil Company, 117 S.Ct. 843 (72 FEP Cases 1856) (1997).

In citing General Telephone Co. v. EEOC, 446 U.S. at 326, the EEOC acts not only on behalf of private parties but also "to vindicate the public interest in preventing employment discrimination." The First Circuit reasoned that "public policy clearly favors the free flow of information between victims employment discrimination and the agency entrusted with righting the wrongs inflicted upon them." 94 F.3d at 745. Thus, "any agreement that materially interferes with communication between an employee and the Commission sows the seeds of harm to the public interest." Id. at 744.

A strong public interest also prohibits interference with the right to file a charge with EEOC. The Commission relies on charges not only as its principal source of information regarding unlawful conduct, but also, in the case of Title VII and the ADA, as a statutory prerequisite for its investigations and proceedings. 42 U.S.C. §2000e-5(b); 42 U.S.C. §12117(a) (ADA section incorporating Title VII procedures). Under the ADEA and EPA, the Commission is empowered to investigate without a charge. 29 U.S.C. §626(a) (ADEA) and 29 U.S.C. §211 of the Fair Labor Standards Act (FLSA).

The primary purpose of a charge of discrimination filed with the EEOC is to "place the EEOC on notice that someone ... believes that an employer has violated one of the anti-discrimination statutes." EEOC v. Shell Oil Co., 466 U.S. at 68; see also EEOC v. Cosmair, Inc., 821 F.2d 1085, 1089 (44 FEP Cases 569) (5th Cir. 1987). This notice to the EEOC serves to trigger law enforcement proceedings by the EEOC that include an investigation and, if there is a finding of discrimination, may include conciliation and litigation. Thus, every charge filed with the EEOC carries two potential claims

for relief: the charging party's claim for individual relief, and the EEOC's claim "to vindicate the public interest in preventing employment discrimination." General Telephone Co. v. EEOC, 446 U.S. at 326.

In Section 35.130, General Prohibitions Against Discrimination, Subpart B - General Requirements, the general prohibitions are based on existing regulations implementing Section 504 and therefore, are already familiar to state and local entities covered by Section 504.

Paragraph (b)(1)(v) provides that a public entity may not aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program. This paragraph is taken from the regulations implementing Section 504 for federally assisted programs.

Paragraph (b)(1)(vi) prohibits the public entity from denying a qualified individual with a disability the opportunity to participate as a member of a planning or advisory board.

Paragraph (b)(1)(vii) prohibits the public entity from limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the public entity from utilizing criteria or methods of administration that deny individuals with disabilities access to the public entity's services, programs, and activities or that perpetuate the discrimination of another entity, if public entities are subject to common administrative control or are agencies of the same State. The phrase "criteria or methods of administration" refers to official written policies of the public entity and to the actual practices of the public entity. This paragraph prohibits

both blatantly exclusionary policies or practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate. The U.S. Supreme Court in Alexander v. Choate, 469, U.S. 287 (1985) adopted this standard which is consistent with the interpretation of Section 504. The Court in Choate stated that members of Congress made numerous statements during passage of Section 504 regarding eliminating architectural barriers, providing access to transportation, and eliminating discriminatory effects of job qualification procedures. The Court noted that: "These statements would ring hollow if the resulting legislation could not rectify the harms by effect as well as by design." Id. at 297.

Paragraph (b)(7) is a specific application of the requirement under the general prohibitions of discrimination that public entities make reasonable modifications in policies, practices, or procedures where necessary to avoid discrimination on the basis of disability. Section 392(b)(2)(A)(ii) of the ADA sets out this requirement specifically for public accommodations covered by Title III of the Act, and the House Judiciary Committee Report directs the Attorney General to include those specific requirements in the Title II regulation to the extent that they do not conflict with the regulations implementing Section 504. Judiciary report at 52.

Paragraph (a) restates the nondiscrimination mandate of Section 202 of the ADA. The remaining paragraphs in §35.130 establish the general principles for analyzing whether any particular action of the public entity violates this mandate.

Paragraph (b) prohibits overt denials of equal treatment of individuals with disabilities. A public entity may not refuse to provide an individual with a disability with an equal opportunity to participate in or benefit from its program simply because the person has a disability.

Paragraph (b)(i) provides that it is discriminatory to deny a person with a disability the right to participate in or benefit from the aid, benefit, or service provided by a public entity. Paragraph (b)(1)(ii) provides that the aids, benefits, and services provided to persons with disabilities must be as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as those provided to others. These paragraphs are taken from the regulations implementing Section 504 and simply restate principles long established under Section 504.

Paragraph (b)(1)(iv) permits the public entity to develop separate or different aids, benefits, or services when necessary to provide individuals with disabilities with an equal opportunity to participate in or benefit from the public entity's programs or activities, but only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Even when separate or different aids, benefits, or services would be more effective, paragraph (b)(2) provides that a qualified individual with a disability still has the right to choose to participate in the program that is not designed to accommodate individuals with disabilities. Paragraph (d) requires that a public entity administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

Paragraph (b)(2) specifies that, notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different. Paragraph (e), which is derived from Section 501(d) of the Americans with Disabilities Act, states that nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit that he or she chooses not to accept.

These provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities.

Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do.

Fundamental to the purposes of the Americans with Disabilities Act is integration. Provision of segregated accommodations and services relegates persons with disabilities to second-class status.

Even when separate programs are permitted, individuals with disabilities cannot be denied the opportunity to participate in programs that are not separate or different. This is an important and overarching principle of the Americans with Disabilities Act. Separate, special, or different programs that are designed to benefit persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities.

This prohibition is also a specific application of the general prohibitions of discrimination and is based on Section 302(b)(2)(A)(i) of the ADA. It prohibits overt denials of equal treatment of individuals with disabilities, or establishment of exclusive or segregative criteria that would bar individuals with disabilities from participation in services, benefits, or activities.

Paragraph (b)(8) also prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others.

Paragraph (c) provides that nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities, beyond those required by this part.

Sections 35.130(e)(1) and (2) are based on Section 501(d) of the ADA. Section 501(d) was designed to clarify that nothing in the ADA requires individuals with disabilities to accept special accommodations and services for individuals with disabilities that may segregate them. The Committee added this Section 591(d) to clarify that nothing in the ADA is intended to permit discriminatory treatment on the basis of disability, even when such treatment is rendered under the guise of providing an accommodation, service, aid or benefit to the individual with a disability.

In Section 35.134 Retaliation or Coercion, Section 35.134 implements Section 503 of the ADA, which prohibits retaliation against any individual who exercises his or her rights under the Act. Paragraph (a) of 35.134 provides that no private or public entity shall discriminate against any individual because that individual made a charge, testified, assisted, or participated in any manner in an investigation, hearing or proceeding under the Act or this part.

Paragraph (b) provides that no private or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise of his or her rights under this part or because that individual aided or encouraged any other individual in the exercise or enjoyment of any right granted or protected by the Act or this part.

This section protects not only individuals who allege a violation of the Act or this part, but also any individuals who support or assist them. This section applies to all investigations initiated under the Act or this part without regard to the ultimate resolution of the underlying allegations. Because this

section prohibits any act of retaliation or coercion in response to an individual's effort to exercise rights established by the Act and this part (or to support the efforts of another individual), the section applies not only to public entities subject to this part, but also to persons acting in an individual capacity or to private entities.

In B. Prohibitions Against Retaliation, Congress enacted provisions barring retaliation in each of the statutes enforced by the Commission in large part to ensure that employees remain free to report suspected violations to the government. See Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881, 889 (71 FEP Cases 70) (7th Circuit 1996) ("Given the instrumental role individual employees play in the statutory scheme, the protection of those individuals from retaliatory acts by the employer 'is essential to accomplish the purpose of Title VII.'") (quoting EEOC v. Pacific Press Pub. Ass'n., 676 F.2d 1272 (28) (28 FEP Cases 1596) (9th Cir. 1982); Garcia v. Lawn, 805 F.2d 1400, 1405 (42 FEP Cases 873) (9th Cir. 1986) (retaliation "is likely to cause irreparable harm to the public interest in enforcing the law by deterring others from charges"). Cf. NLRB v. Scrivener, 405 U.S. 117, 121-122 (79 LRRM 2587) (1972) ("Congress has made clear that it wishes all persons with information about (unlawful practices) to be completely free from coercion against reporting them to the (government)." This complete freedom is necessary "to prevent the (government's) channels of information from being dried up by employer intimidation of prospective complaints and witnesses") (construing anti-retaliation provisions of the National Labor Relations Act.)

Agreements that attempt to bar individuals from filing a charge or assisting in a Commission investigation run afoul of the anti-retaliation provisions because they impose a penalty upon those who are entitled to engage in protected activity under one or more of the statues enforced by the Commission. By their very existence, such agreements have a chilling effect on the willingness and ability of individuals to come forward

with information that may be of critical import to the Commission as it seeks to advance the public interest in the elimination of unlawful employment discrimination. See, e.g., EEOC v. Board of Governors, 957 F.2d 424 (58 FEP Cases 292) (7th Cir.), cert. denied, 506 U.S. 906 (59 FEP Cases 1536) (1992) (unlawful retaliation for a collective bargaining agreement to allow the termination of an administrative grievance proceeding upon the filing of a charge with EEOC); EEOC v. U.S. Steel Corp., 671 F.Supp. at 358 (retaliation under 4(d) of the ADEA results when an employer revokes enhanced pension benefits for persons who file charges or otherwise participates in EEOC proceedings). Cf. Connecticut Light & Power v. Secretary of Labor, 85 F.3d 89 (11 IER Cases 1313) (2d Cir. 1996) (construing the anti-retaliation provisions of the Energy Reorganization Act of 1974 and finding a violation where an agreement sought to prevent an individual from reporting unlawful conduct to the government.

While a private agreement can eliminate an individual's right to personal recovery, it cannot interfere with EEOC's right to enforce Title VII, the EPA, the ADA, or the ADEA by seeking relief that will benefit the public and any victims of an employer's unlawful practices who have not validly waived their claims. See EEOC v. Harris Chernin, Inc., 10 F.3d 1286, 1291-92 (63 FEP Cases 616) (7th Cir. 1993); EEOC v. United Parcel Serv., 860 F.2d 372, 374 (48 FEP Cases 245) (10th Cir. 1988); EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1542-43 (43 FEP Cases 875) (9th Cir. 1987); New Orleans S.S. Ass'n. v. EEOC, 680 F.2d 23, 25 (5th Cir. 1982); EEOC v. McLean Trucking Co., 525 F.2d 1007, 1010 (11 FEP Cases 833) (6th Cir. 1975). Enforcement actions for the purpose of advancing the public interest in the elimination of employment discrimination are squarely within the EEOC's authority "to vindicate rights belonging to the United States as sovereign." Goodyear Aerospace Corp., 813 F.2d at 1543 (citation omitted).

For the reasons set forth and discussed above, an employer may not interfere with an individual's protected right under Title VII, the EPA, the ADA, or the ADEA to file a charge, testify, assist, or participate in any manner in an EEOC investigation, hearing, or proceeding.

Prohibitions against pupil discrimination are relevant and material with respect to Petitioner's allegations of employment discrimination and retaliation for filing complaints with EEOC (Employment Opportunity Commission) as well as with ERD (Equal Rights Division) and Inspector General's Office of the U.S. Department of Education regarding Title I expenditures.

Petitioner states a claim upon which relief can be granted as to statutory provisions of these state law claims. A comprehensive state administrative process may provide remedy to alleged violations of Wisconsin's statute as well as extend to pendent federal jurisdiction for claims under §118.13, Wis. Stats., or Chapter PI 9, Wis. Admin. Code.

Petitioner alleges that Eau Claire Public Schools failed to comply with written school board policy, with 118.13, Wis. Stats., and with PI 9, Wis. Adm. Code. Section 118.13, Wis. Stats., provides in pertinent part that:

In PI 9.01 Discrimination Prohibited, this chapter establishes procedures for compliance with Section 118.13, Stats., which provides that no person may be denied admission to any public school or be denied participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational or other program or activity because of the person's sex, race, national origin, ancestry, or physical, mental, emotional or learning disability. This chapter does not intend to prohibit the provision of special programs or services based on objective standards of individual need or performance to meet the needs of pupils, including gifted and talented, special education, school age parents,

bilingual bicultural, at risk and other special programs, or programs designed to overcome the effects of past discrimination.

CONCLUSION

Petitioner has not failed to establish credible evidence in the record that she is disabled under the ADA. Summary judgment should not dismiss Petitioner's ADA claims. The Petitioner's ADEA claims were filed timely and are within the scope of her EEOC charges and identified numerous adverse employment actions motivated by discriminatory animus on account of Petitioner's age. Accordingly, Petitioner believes that her ADEA claims should not be dismissed. Petitioner established a prima facie case of retaliation against her for filing claims with the EEOC because of numerous adverse employment actions had been shown. In addition, Petitioner also showed direct evidence as well as indirect evidence that Respondent intentionally took retaliatory action against her in violation of Title VII of the Civil Rights Act of 1964, as amended. Petitioner's claims also relate to WEAC Labor Union, Blount, and Burke in regards to breaching their duty of fair representation as her collective bargaining representatives.

"It is well established that review of a district court's grant of summary judgment is de novo." Karazanos v. Navistar Int'l Transp. Co., 948 F.2d 332, 335 (7th Cir. 1991). In other words, the Appellate Court must not be given deference to the district judge and must act as if the motion is being made directly to itself. See Derrico v. Bungee Int'l Mfg. Co., 989 F.2d 247, 249 (7th Cir. 1993.

To uphold a grant of summary judgment, this court must view the record and all reasonable inferences from it in the light most favorable to the party opposing the motion, the Petitioner. This court must then conclude that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. "Summary judgment is only appropriate when the record reveals that no reasonable jury could find for the moving party." McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 3780 (7th Cir. 1992). On summary judgment motions, a court cannot make credibility determinations nor choose between competing inferences as these are functions of the jury. See Sarsha v. Sears Roebuck & Co., 3F.3d 1035, 1041 (7th Cir. 1993).

This standard is applied with increased rigor in employment discrimination cases, where intent and credibility are the central issues. Id. at 1038. "Because evidence directly supporting affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." Courtney v. Biosound, Inc., 42 F.3d 414, 418 (7th Cir. 1994). The non-moving party's own affidavit or deposition can constitute affirmative evidence to defeat a summary judgment motion. Id. Furthermore, a grant of summary judgment which turns on the issue of discriminatory intent must be approached with extra caution. Id. at 423.

Petitioner was aware of "no" good faith efforts on Respondent's part in consulting with Petitioner who had on numerous occasions informed covered entity that accommodations were needed to make a reasonable accommodation that would have provided Petitioner with an equally effective opportunity and would not have caused Respondent undue hardship. In Section 501, a Jury Trial is available when damages are sought for intentional discrimination.

Attorney's fees are also available to Petitioner who prevails on her claim for damages under the Civil Rights Act of 1991 including: Expert Fees, at the Court's discretion.

Four major Federal Laws prohibit Employment Discrimination against persons with Disabilities: Sections 501, 503, and 504 of the Rehabilitation Act (29 U.S.C.A. §§791, 793, 794) and the ADA.

The material facts underlying the issues raised by Petitioner are in dispute and the Court may decide the issues at law raised by the Petitioner.

Since there are still questions of fact that have to be determined regarding alleged discrimination and retaliation, it appears that summary judgment did not get at the facts per se. Therefore, a trial is needed to substantiate the disputed facts.

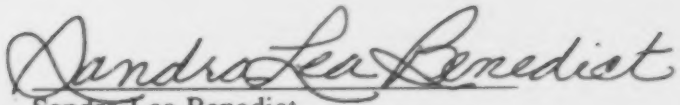
Summary judgment to be granted for Respondent's counterclaim that where the genuine issues of fact that existed and still continues to exist is irrelevant and immaterial appears to be incorrect since it assists in determining whether a violation of the applicable Federal Act has occurred.

It is Petitioner's understanding that the Summary Judgment is not a substitute for a Court or Jury Trial of any issue of material fact that is the subject of a genuine dispute. See 56.04(1), 56.15(1), 56.17(18), 56.18, 56.19, 56.20.

In this case, Petitioner has provided sufficient evidence to defeat Respondent's motion for summary judgment. Specifically, the affidavits and supporting documentation offered up by Petitioner has raised material issues of fact. Thus, the district court improperly granted Respondent's summary judgment motion, as well as the Seventh Circuit Court of Appeals affirmation of the district court decision, and this Honorable Court must reverse those decisions.

For the foregoing reasons, Petitioner respectfully prays that her writ of certiorari be granted.

Respectfully submitted,



Sandra Lea Benedict
Pro Se Litigant
3642 Livingston Lane
Eau Claire, Wisconsin 54701

Date: May 27, 1998

APPENDIX A

Orders, Statutes and Citations

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Argued November 13, 1997

Decided February 10, 1998

Before

Hon. Jesse E. Eschbach, Circuit Judge

Hon. Kenneth F. Ripple, Circuit Judge

Hon. Ilana Diamond Rovner, Circuit Judge

SANDRA LEA BENEDICT,
Plaintiff/Appellant,

No. 97-2513

v.

EAU CLAIRE PUBLIC SCHOOLS, WISCONSIN EDUCATION ASS'N COUNCIL, THOMAS BLOUNT, MICHAEL BURKE,
Defendants/Appellees.

Appeal from the United States District Court for the Western District of Wisconsin

No. 95-C-0568-S

John C. Shabaz, Judge.

ORDER

Sandra Benedict brought this lawsuit against her employer, Eau Claire Public School District ("ECPS"), alleging that ECPS violated the Age Discrimination in Employment Act of 1967 ("ADEA"), see 29 U.S.C. §621 et seq., the Americans with Disabilities Act of 1990 ("ADA"),

see 42 U.S.C. §12101 et seq., and that ECPS engaged in retaliatory conduct because she filed her claims of discrimination. Ms. Benedict also alleged that union bargaining representatives Thomas Blount and Michael Burke and the Wisconsin Education Association Council ("WEAC"), a labor organization, breached their duty of fair representation in failing to prosecute her grievances against ECPS. The district court granted summary judgment for ECPS, holding that Benedict had failed to establish her prima facie cases of discrimination and retaliation; the court dismissed the complaints against the other defendants on a variety of grounds. Ms. Benedict, proceeding pro se on appeal, argues that the court erred in granting summary judgment. While this court lacks jurisdiction to review many of Ms. Benedict's allegations, three of her complaints survive. Because Ms. Benedict has failed to come forward with sufficient evidence to support her claims, we affirm.

I. STATEMENT OF FACTS

Sandra Benedict was born in 1949, and taught for ECPS between 1972 and March 1996, when she took disability retirement. At all times relevant to her claims here, she was a member of WEAC, a labor organization that represents public school teachers in the Eau Claire Public School District. Tom Blount and Michael Burke are officers in labor organizations that provide grievance handling, collective bargaining and administrative services support for the WEAC affiliate in Eau Claire.

In 1986, Ms. Benedict was involved in a car accident that left her with a variety of maladies: chronic back, neck and shoulder pain; some instability of gait and a tendency to sway or fall to her right side, consistent with inner-ear abnormalities; post-traumatic stress syndrome with associated chronic muscle and ligament pain; heightened susceptibility to stress and anxiety; vocal problems of uncertain etiology; occasional blurring of vision and some loss of left eye nerve

sensitivity; chronic headaches (perhaps migraine); and cognitive processing difficulties, with some short-term attention and concentration problems, possibly related to an auditory processing disorder. Several of the physicians who examined Ms. Benedict noted the lack of an obvious physical basis for her condition; the difficulty in arriving at any clear-cut diagnosis; and the possibility that Benedict's physical problems were, at least in part, psychologically driven.

Ms. Benedict took a medical disability leave during the fall of 1990 but returned in January 1991, when her doctors declared her fit to continue. She was placed at Boyd School, an older multi-level site. This required that she occasionally climb stairs during the course of her day, a problem because of her difficulties with balance and stiffness. Moreover, friction developed between Ms. Benedict and her principals at Boyd; they were apparently unsympathetic to her condition and openly questioned the nature and existence of her ailments.

Because of her dissatisfaction at Boyd, Ms. Benedict requested a transfer to the single-level Putnam Heights School for the 1993-94 school year. She was interviewed in August 1993, by principal Jane Robertson-Johnson but was not hired. Ms. Benedict avers that Robertson-Johnson, "best friends" with one of the Boyd School principals, informed Ms. Benedict that she "needed to hire the best person for the job," and that she was afraid that hiring Benedict "would make her school go backwards."

ECPS Title I Director Rick Savolainen then assigned Ms. Benedict to teach in ECPS' "mobile classroom," a classroom on wheels that serviced five school sites. While the mobile classroom is a single-level unit, Ms. Benedict was also responsible for gathering and returning her students at each of the schools, thereby increasing her walking and stair climbing during the day. Moreover, the mobile classroom was apparently prone to rocking when the students were active, further increasing Ms. Benedict's discomfort. Once again she

requested a transfer at the end of the school year – to single-level sites at Northwoods and Sherman Schools – but once again, she was not selected. Ms. Benedict contends that the spots were given to two teachers under forty years of age, with less seniority and experience. Following a mid-August 1994, meeting with ECPS officials, Blount, Burke and Ms. Benedict, she was assigned to teach half-time at Randall School and half-time at Lincoln School, two older multi-level sites, for the 1994-95 school year.

On June 28, 1995, Ms. Benedict attended a meeting at Randall at which Mary Seitz, the new principal, informed her that she intended to cut Benedict's Title I position from the curriculum for the forthcoming year. Ms. Benedict avers that Seitz explained that she was "only going to hire one Title I teacher for the following year" because she "did not want to spend the money on Title I programming," preferring instead "to spend [the money] on extracurricular activities." Ms. Benedict then applied for transfers to the Sherman and Locust Lane schools for the 1995-96 school year. When she contacted the ECPS Personnel Director in mid-August to check the status of her applications, however, she was told that the two positions had been filled and the appointments approved by the school board.

Ms. Benedict was informed by Savolainen that she would continue to split her time between Randall and Lincoln for the forthcoming year, but when she reported to Randall on August 21, 1995, Seitz told her to leave the campus and that she would no longer be working there. Benedict reported the incident to Savolainen, who told her that she had not been reassigned and that she should consider herself placed at Randall until he told her otherwise. When Ms. Benedict returned the next day, Seitz told her that she "did not want the other teachers to see [her] face" and that she should return to her room "and hide." Seitz's response to these allegations is only that they are "inaccurate." Curiously, ECPS Assistant Superintendent for Personnel Don Lillrose issued a document

on September 7, 1995, entitled "Subject: Vacancies, Certified Posting No. 463." The notice, printed on ECPS letterhead, lists five Title I kindergarten through second grade teaching vacancies, full and part time, opening on an emergency basis at Randall for the 1995-96 school year. Applicants were instructed to "notify the Personnel Office in writing by September 24, 1995." It is not clear who, if anyone, was hired for the Randall teaching positions.

Ms. Benedict was subsequently transferred full-time to Lincoln School for the 1995-96 school year, where, she asserts, she was subsequently denied participation in a career-related workshop held on October 11-13. She also avers that the Lincoln principal requested Ms. Benedict's colleagues to put in writing their expectations of her.

II. PROCEDURAL HISTORY

On May 13, 1994, Ms. Benedict filed a charge with the EEOC and the Equal Rights Division of the Wisconsin Department of Industry, Labor, and Human Relations ("ERD"), alleging that ECPS violated the Age Discrimination in Employment Act of 1967 ("ADEA"), see 29 U.S.C. §621 et seq., and the Americans with Disabilities Act of 1990 ("ADA"), see 42 U.S.C. §12101 et seq. She claimed that her 1993 transfer denial to Putnam Heights constituted age discrimination and a failure to accommodate her medical disabilities; and that she had been subjected to "ongoing intimidation" by her principals at Boyd School. On June 5, 1995, the EEOC issued its determination, finding no evidence of discrimination. Ms. Benedict filed a second charge with the EEOC on October 1, 1995, alleging that the termination by Mary Seitz of her Title I position at Randall was retaliatory for her prior EEOC filing. The EEOC dismissed her charge of retaliation on January 16, 1996, citing her lawsuit in federal court as grounds.

Ms. Benedict brought her case to federal court on August 8, 1995. She named ECPS, WEAC and several others as defendants, and raised numerous allegations:[1] she had been subjected to ongoing intimidation by her Boyd School principals following her return from disability leave; she had been excluded from career-related workshops while at Boyd School; the 1993 denial of her transfer requests to Putnam Heights and her subsequent transfer to the district's mobile classroom constituted age and disability discrimination; the 1994 denials of her transfer requests to the Northwoods and Sherman schools, and the 1995 denials of her transfer requests to the Sherman and Locust Lane Schools were discriminatory; the 1995 termination of her Title I position at Randall School by principal Mary Seitz was retaliatory for her prior EOC filing; and her October 1995, exclusion from a workshop at Lincoln school, and the Lincoln principal's request that her colleagues put their expectations of her into writing, were discriminatory.

The district court granted summary judgment for ECPS on March 20, 1996, holding that Ms. Benedict had failed to

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[1] Benedict alleged that WEAC and union bargaining representatives Tom Blount and Michael Burke breached their duty of fair representation by not assisting her in prosecuting her grievances against ECPS. Benedict's action against WEAC was dismissed without prejudice because she failed to serve the organization with process. See Fed. R. Civ. P. 4(m); Omni Capital Int'l, Ltd. v. Rudolph Wolff & Co., Ltd., 484 U.S. 97, 104-05 (1987). This court thus lacks jurisdiction under 28 U.S.C. §1291 to consider that claim. See Perry R. Pennington Co. v. T.R. Miller Co., Inc., 994 F.2d 390, 392-93 (7th Cir. 1993). Similarly, because Benedict abandoned her claims against Blount and Burke in a stipulation entered by the district court pursuant to Fed. R. Civ. P. 41(a), there is no need to further consider her appeal against these defendants.

Finally, Ms. Benedict filed claims of discrimination against numerous ECPS employees in their individual capacities, including Savolainen, Robertson-Johnson, and her former Boyd School principals. The district court properly dismissed her claims against these defendants for failure to state a claim under Fed. R. Civ. P. 12(b)(6), because they are not statutory employers. See EEOC v. AIC Security Investigation, Ltd., 55 F.3d 1276, 1282 (7th Cir. 1995). Her claims against these defendants in their individual capacities are thus not considered here.

establish her prima facie cases of discrimination and retaliation. Specifically, the court found: 1) Ms. Benedict had failed to demonstrate that she suffered from an impairment under the ADA that substantially limited her major life activities; and 2) she had not suffered a sufficiently adverse change in the terms or conditions of her employment to support her discrimination or retaliation claims. Following the district court's entry of final judgment, Ms. Benedict filed a timely notice of appeal.

The district court had subject matter jurisdiction under 28 U.S.C. §1331; this court has appellate jurisdiction pursuant to 28 U.S.C. §1291.

III. DISCUSSION

Standard of Review

Although Ms. Benedict was represented by counsel in the district court, she is proceeding pro se on appeal. Her claims will therefore be construed liberally. See Bagola v. Kindt, 39 F.3d 779, 780-81 (7th Cir. 1994); Vanskike v. Peters, 974 F.2d 806, 807 (7th Cir. 1992). It is not the role of an appellate court, however, to research and construct legal arguments otherwise available to a litigant and her attorneys, see Tyler v. Runyon, 70 F.3d 458, 466 (7th Cir. 1995), nor is the court obligated to scour the record in search of facts or evidence to support the litigants' positions, see Hunt-Goliday v. Metropolitan Water Reclamation Dist., 104 F.3d 1004, 1010 & n.2 (7th Cir. 1997).

The standard of review for a grant of summary judgment is de novo; the record and all inferences drawn therefrom will be viewed in the light most favorable to Ms. Benedict, the non-movant. See Johnson v. City of Ft. Wayne, 91 F.3d 922, 930 (7th Cir. 1996). A court may grant summary judgment only if "the pleadings, depositions, answers to

interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). These standards are applied with "added rigor" in employment discrimination cases, "where intent and credibility are crucial issues." Courtney v. Biosound, Inc., 42 F.3d 414, 418 (7th Cir. 1994) (internal quotation and citation omitted). Nonetheless, Ms. Benedict, as the non-movant, may not rely upon mere allegations, but must instead present specific facts to show that a genuine issue of material fact exists. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986). Where she bears the burden of proof on an issue, she must go beyond the pleadings, affirmatively demonstrating a genuine issue of material fact for trial. Ms. Benedict's own affidavit and deposition may constitute affirmative evidence in order to withstand a motion for summary judgment, see Courtney, 42 F.3d at 418, but the evidence relied upon must be "competent evidence of a type otherwise admissible at trial. Thus, a party may not rely upon inadmissible hearsay in an affidavit or deposition to oppose a motion for summary judgment." Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 562 (7th Cir. 1996). Her burden is not carried if she fails to demonstrate that the record, taken as a whole, could permit a rational finder of fact to rule in her favor. See Johnson, 91 F.3d at 931; see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-50 (1986).

On appeal, Ms. Benedict revisits the arguments she presented in the district court, contesting the district court's holding that she failed to establish her prima facie cases of discrimination and retaliation. For reasons discussed more fully in Section D below, only three of Benedict's allegations are properly before this court on appeal: her charges that the August 1993 denial of her transfer request from Boyd to Putnam Heights and her subsequent transfer to the mobile classroom violated the ADA and the ADEA; and that the 1995 termination of her Title I position at Randall by principal Mary

Seitz constituted impermissible retaliation for her prior EEOC filing.

A. Disability Discrimination

Ms. Benedict contends that her "physical impairments," specifically, "her back, neck and walking problems" required that she "be accommodated for physical disability." She argues that her chronic injuries made it "difficult" for her to maintain her balance and negotiate the stairways at multi-level school sites and that the rocking of the mobile classroom aggravated her balance and headache problems. Ms. Benedict concludes that the denial of her transfer application to Putnam Heights (the school of her choice) and her subsequent placement in the district's mobile classroom constituted a failure to accommodate her medical disabilities in violation of the ADA.

The ADA provides that an employer must make "reasonable accommodations" to a qualified individual with known physical or mental limitations. 42 U.S.C. §12112(b)(5)(A); see also Weiler v. Household Fin. Corp., 101 F.3d 519, 525 (7th Cir. 1996). Denying employment opportunities to a qualified employee because of a need to accommodate her disability is likewise prohibited. See 42 U.S.C. §12112(b)(5)(B); Bultemeyer v. Fort Wayne Community Sch., 100 F.3d 1281, 1284-87 (7th Cir. 1996). To warrant protection under the ADA, an individual must first suffer from a "disability," defined in relevant part as a "physical or mental impairment that substantially limits" one or more of an individual's major life activities, 42 U.S.C. §12102(2)(A), such as walking, seeing, hearing, speaking or working, see 29 C.F.R. §1630.2(*i*); or being regarded as having such a disability, see 42 U.S.C. §12102(2)(C); 29 C.F.R. §§1630.2(g)(3), (*l*)(1)-(3); Harrington v. Rice Lake Weighing Sys., Inc., 122 F.3d 456, 459 (7th Cir. 1997); Johnson v. American Chamber of Comm. Publishers, Inc., 108 F.3d 818, 819-20 (7th Cir. 1997). "Substantially limits,"

in turn, means that an individual is "unable to perform a major life activity" or is "significantly restricted as to the condition, manner or duration under which an individual can perform a major life activity." 29 C.F.R. §1630.2(j)(l)(i)-(ii). It is clear, then, that not every impairment that affects an individual's life is a "substantially limiting impairment." Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1454 (7th Cir. 1995). "[T]he impairment must be a significant one." Id.; see also Weiler, 101 F.3d at 524-25.

In order to establish her "failure to accommodate" claim against ECPS, the burden falls to Ms. Benedict to present specific facts and admissible evidence showing: 1) she is statutorily disabled; 2) ECPS was aware of the disability; and 3) she was qualified for the position in question. See Best v. Shell Oil Co., 107 F.3d 544, 547-48 (7th Cir. 1997). Ms. Benedict has failed to carry her burden. To establish that she is disabled as defined under the ADA, Ms. Benedict submitted eight letters written by physicians and a physical therapist to various parties between 1988 and 1995, all of which are objectionable as hearsay. See Fed. R. Evid. 801(c); Bombard, 92 F.3d at 562, 564. As such, they are insufficient to withstand a motion for summary judgment. See McKenzie v. Illinois Dep't of Trans., 92 F.3d 473, 484 (7th Cir. 1996). This court explained in Bombard v. Fort Wayne Newspapers, Inc., that Rule 803(4) of the Federal Rules of Evidence "does not purport to except, nor can it reasonably be interpreted as excepting, statements by the person providing the medical attention to the patient." 92 F.3d at 564.

It is unclear from the grant of summary judgment whether or to what extent the district court considered the letters Ms. Benedict submitted in support of her claim. Though disfavored, some courts have occasionally considered hearsay in opposition to motions for summary judgment under certain limited circumstances. See Eisentstadt v. Centel Corp., 113 F.3d 738, 742-43 (7th Cir. 1997) (citing cases). Even if the district court had considered these letters, however, they would

be insufficient to establish that Ms. Benedict suffers from a substantially limiting mental or physical impairment. See 42 U.S.C. §12102(2)(A); 29 C.F.R. §§1630.2(*i*), (j)(l)(i)-(ii); Roth, 57 F.3d at 1454-55. Some of the more urgent medical assessments Ms. Benedict cites predate her 1991 return to work. Her physician's 1990 return-to-work letter notes her "many vague neurologic symptoms" and the difficulty of arriving at any concrete diagnosis, admitting that "extensive evaluation" revealed no "significant neurologic defects." A letter in which a physical therapist cites Benedict's history of balance and equilibrium difficulties is contradicted by another letter in which a physician concludes that Ms. Benedict has "normal function of the balance system." Only two of the physicians who wrote letters following Ms. Benedict's return to work mention her stair climbing problems. One notes that she has "some reduced physical tolerance because of deconditioning"; the other, that because Benedict suffers from a condition known as Meniere's disease, her problems with headaches and balance are aggravated by stair climbing and rocking. None of the five letters that were written following Ms. Benedict's return to work can reasonably be read as a claim that her condition rendered her unable to teach, walk, climb stairs, or that she was otherwise significantly restricted in the performance of those activities. Indeed, even the letters that predate her return to work note "an essentially normal neurological examination," "a normal clinical examination," "no obvious disease," and "a review of her performance evaluations at school do [sic] not suggest any major difficulties in job performance."

The crux of Ms. Benedict's complaint is not that her impairments leave her substantially limited with respect to working, walking or stair climbing; rather, it is that she is substantially limited with respect to excessive walking or stair climbing between classes. This is insufficient: the impairment must significantly restrict Ms. Benedict's ability to perform "a class of jobs or a broad range of jobs in various classes," 29 C.F.R. §1630.2(j); see also Weiler, 101 F.3d at 525; Homeyer

v. Stanley Tulchin Assoc., 91 F.3d 959, 961 (7th Cir. 1996), or some other major life activity, see, e.g., Penny v. United Parcel Serv., 128 F.3d 408 (6th Cir. 1997) (walking or stair climbing even with "moderate difficulty or pain" does not rise to the level of a disability) (collecting cases); Robinson v. Global Marine Drilling Co., 101 F.3d 35 (5th Cir. 1996) (stair climbing that aggravated plaintiff's asbestosis did not qualify as major life activity); Weiler, 101 F.3d at 524-26 (heightened anxiety and stress, migraines and depression triggered by an unpleasant supervisor were not substantial limitations on a major life activity); Kelly v. Drexel Univ., 94 F.3d 102 (3rd Cir. 1996) (plaintiff with "visible and apparent" limp who had difficulties climbing stairs was not substantially limited in a major life activity) (collecting cases); Hankins v. The Gap, Inc., 84 F.3d 797 (6th Cir. 1996) (employer was not necessarily required under ADA to transfer employee to other locales simply because of worksite-induced migraine headaches); Roth, 57 F.3d at 1454-56 (physician who complained of visual impairment, headaches and fatigue not entitled under ADA to the rotation of his choice); Hunt v. Boyd Gaming Corp., No. CIV.A. 96-1909, 1997 WL 369617 (E.D. La. June 30, 1997) (post-traumatic stress syndrome insufficiently limiting where plaintiff was allegedly unable to perform a single, particular job); Marschand v. Norfolk & W. Ry. Co., 876 F. Supp. 1528 (N.D. Ind. 1995) (same); aff'd, 81 F.3d 714 (7th Cir. 1996). An inability to perform one particular job, a portion of one particular job for a single employer, or increased discomfort while performing a major life activity does not constitute a substantial limitation on the ability to perform such activities. See Harrington, 122 F.3d at 460; Weiler, 91 F.3d at 524. As this court has recognized, "major life activity" cannot be interpreted to mean "working at the specific job of one's choice." Roth, 57 F.3d at 1455 (internal quotation and citation omitted).

Neither does the record support the inference that Ms. Benedict's transfer request was denied because she was perceived to be disabled. See 42 U.S.C. §12102(2)(C); 29

C.F.R. §§1630.2(g)(3), (*l*)(1)-(3). An impairment, physical or mental, is not necessarily an impairment that significantly restricts a major life activity, see Weiler, 101 F.3d at 523-25; Roth, 57 F.3d at 1454, nor can the ADA be considered "a general protection of medically afflicted persons," Christian v. Saint Anthony Med. Ctr., Inc., 117 F.3d 1051, 1053 (7th Cir. 1997). It was intended to protect those with disabilities or who are incorrectly regarded as having disabilities. Where the employer discriminates against an individual who is ill, who is mistakenly thought to be ill, or who may even be permanently ill but is not disabled, there is no violation of the Act. See Harrington, 122 F.3d at 460; Christian, 117 F.3d at 1053; accord, Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 806-07 (5th Cir. 1997). Viewed in this light, the record on summary judgment does not suggest that Putnam Heights principal Robertson-Johnson perceived Ms. Benedict to be substantially limited in her ability to perform a major life function, whatever else she may have thought. See 42 U.S.C. §§12102(2)(C); 29 C.F.R. §§1630.2(g)(3), (*l*)(1)-(3); see also Christian, 117 F.3d at 1053; Russell v. Acme-Evans Co., 51 F.3d 64, 68, 70-71 (7th Cir. 1995) (failure to develop evidence doomed plaintiff's claim).

It is important to remember that there are "varying degrees of impairments as well as varied individuals who suffer from the impairments." Homeyer, 91 F.3d at 962. Indeed, as the interpretive commentary to the ADA regulations makes clear, "Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitutes a disability.... Some impairments may be disabling for particular individuals but not for others, depending on ... the presence of other impairments that combine to make the impairment disabling...." 29 C.F.R. Pt. 1630, app. §1630.2(j). This possibility requires, as we have suggested elsewhere, that the courts unflaggingly engage in a careful examination of each of these "fact-intensive cases." Skouby v. Prudential Ins. Co. of Am., 130 F.3d 794, 795 (7th Cir. 1997). Based on the record before this court, however,

Ms. Benedict has failed to establish that the constellation of problems from which she suffers renders her significantly restricted in the performance of any major life activity. See Weiler, 101 F.3d at 523-25; Bombard, 92 F.3d at 564. Consequently, ECPS was under no obligation imposed by the ADA to accommodate her ailments by accepting her transfer requests to Putnam Heights, from the mobile classroom, or anywhere else.

B. Age Discrimination

Ms. Benedict charged that ECPS denied her transfer from Boyd to Putnam Heights based on age discrimination.

The ADEA makes it unlawful for an employer to discriminate against an employee 40 years of age or older with respect to the employee's "compensation, terms, conditions or privileges of employment" based on the employee's age. 29 U.S.C. §623(a)(1); id. at §631(a). To sustain her age discrimination claim, Ms. Benedict must show that her age was a "determining factor" in the denial of her application to Putnam Heights, that "but for" her age, her 1993 transfer application would have been accepted. Wolf v. Buss (America) Inc., 77 F.3d 914, 919 (7th Cir.), cert. denied, 117 S.Ct. 175 (1996). She chose to proceed through the indirect, burden-shifting method, which requires that she demonstrate: 1) membership in a statutorily protected class (40 years or older); 2) she was performing satisfactorily; 3) that despite her satisfactory performance she suffered a materially adverse employment action; and 4) others younger that she were treated more favorably. See Rabinovitz v. Peña, 89 F.3d 482, 486 (7th Cir. 1996); see also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981); McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).

Ms. Benedict cannot satisfy the third element of the McDonnell Douglas test, that she suffered a sufficiently

adverse employment action. Thus, the burden of production never shifts to ECPS to come forward with a legitimate, non-discriminatory reason for the transfer denial. See Coco v. Elmwood Care, Inc., 128 F.3d 1177, 1179 (7th Cir. 1997). A lateral transfer (or the denial of a voluntary lateral transfer request), without such additional indicators as a pay cut, significant loss of benefits, or diminished material responsibilities – all of which are absent here – is not a sufficiently adverse employment action to warrant ADEA protection. See, e.g., Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996); Flaherty v. Gas Research Inst., 31 F.3d 451, 456-57 (7th Cir. 1994); Crady v. Liberty Nat'l Bank & Trust Co., 993 F.2d 132, 135-36 (7th Cir. 1993); Spring v. Sheboygan Area Sch. Dist., 865 F.2d 883, 886 (7th Cir. 1989).

Ms. Benedict's transfer to the mobile classroom was not a sufficiently adverse employment action to warrant ADEA protection. Consequently, the district court did not err in granting ECPS' motion for summary judgment based on this claim.

C. Retaliation

Ms. Benedict alleges that the termination of her Title I position at Randall and her subsequent transfer to Lincoln School were retaliatory for filing her prior charges of age and disability discrimination. See 29 U.S.C. §623(d); 42 U.S.C. §12203(a).

This court has recently noted that the law does not take a "laundry list" approach to retaliation, in part because "its forms are as varied as the human imagination will permit." Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996). Evidence of retaliation has been found where an employee was given a lateral transfer, without reduction in pay or benefits, that nevertheless placed her in a sort of workplace limbo,

stripped of substantial job responsibilities, assignments, authority and business amenities, see Collins v. Illinois, 830 F.2d 692, 702-06 (7th Cir. 1987) (collecting cases); where an employee was subjected to a vicious, unchecked campaign of gossip and harassment by her co-workers, who made no bones about being out to "get her," Knox, 93 F.3d at 1334-35; where a supervisor was permanently transferred to an out-of-state office for failing to induce a subordinate to drop her complaints of harassment, see McDonnell v. Cisneros, 84 F.3d 256, 261-63 (7th Cir. 1996); and where an employee suffered a dramatic erosion in the complexity and variety of her job responsibilities, see Dahm v. Flynn, 60 F.3d 253, 257 (7th Cir. 1995).

To establish a claim of retaliation, Ms. Benedict must show: 1) she engaged in protected activity; 2) she suffered an adverse employment action subsequent to the protected activity; and 3) the two are causally related. See Smart v. Ball State Univ., 89 F.3d 437, 440 (7th Cir. 1996); Johnson v. University of Wis., 70 F.3d 469, 479 (7th Cir. 1995). Causality in this context has been construed to mean merely that "the protected activity and the adverse action were not wholly unrelated." Hunt-Golliday, 104 F.3d at 1014 (internal quotation and citation omitted); Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307, 1315 n.4 (7th Cir. 1989). While temporal proximity is circumstantial evidence of such a link, see McClendon v. Indiana Sugars, Inc., 108 F.3d 789, 796-97 (7th Cir. 1997); Hunt-Golliday, 104 F.3d at 1014; Rabinovitz, 89 F.3d at 489, the plaintiff must nevertheless demonstrate that the employer would not have taken the forbidden action "but for" the protected expression, Gleason v. Mesirow Fin., Inc., 118 F.3d 1134, 1146 (7th Cir. 1997); McKenzie, 92 F.3d at 483.

Element one of Ms. Benedict's prima facie case is easily satisfied, since there is no question that filing a charge with the EEOC is protected activity. See, e.g., Smart, 89 F.3d at 440-41. Beyond this point, however, Ms. Benedict's effort

to establish her prima facie case founders: her transfer to Lincoln, as noted above, is insufficiently adverse to sustain Ms. Benedict's claim of workplace retaliation. See Williams, 85 F.3d at 274; Flaherty, 31 F.3d at 456-57; Crady, 993 F.2d at 135-36; Spring, 865 F.2d at 886.

Ms. Benedict faces other problems with respect to the termination of her Title I position at Randall. Termination is an unmistakably adverse employment act. See, e.g., Gleason, 118 F.3d at 1146; McClendon, 108 F.3d at 796. There is evidence that the episode at Randall was acrimonious; there is even evidence that Seitz's reason for terminating Ms. Benedict's position, "because she did not want to spend the money on Title I programming, but would prefer to spend it on extracurricular activities," was phony. In this regard, the September 7, 1995, posting of vacancies opening at Randall on an emergency basis for the 1995-96 school year is particularly troubling. Nevertheless, no one – not Seitz, not ECPS Assistant Superintendent for Personnel Don Lillrose, not Title I Director Rick Savolainen, not anyone – was deposed about the listing, nor were interrogatories submitted to those who might have had knowledge of the incident. See Monroe v. Children's Home Ass'n of Ill., 128 F.3d 591, 593-94 (7th Cir. 1997); Russell, 51 F.3d at 68, 70-71. Moreover, Ms. Benedict's filing and the Randall termination took place thirteen months apart; the remoteness of the two events, while not dispositive of a lack of causality, is "counter-evidence" of such a connection. Johnson, 70 3d at 480; see also McKenzie, 92 F.3d at 485. Neither does the record suggest any basis for concluding that Seitz, who was the "new" Randall principal in 1995, had some reason to retaliate against Ms. Benedict. While Seitz's characterization of Ms. Benedict's allegations as merely "inaccurate" is unsatisfying, to say the least, it does not lead ineluctably to the conclusion that the termination was undertaken in retaliation for Ms. Benedict's prior EEOC filing. Without some evidence suggesting that the termination of Ms. Benedict's Title I position was connected to her EEOC filing,

the district court did not err in granting ECPS' motion for summary judgment.

D. Prior Resort to Administrative Remedies

Ms. Benedict's federal complaint enumerated a range of charges. Other than the claims discussed above, however, her allegations were not properly before the district court and thus, are not properly before this court.

As a general rule, an employee who files a discrimination complaint in federal court cannot raise claims that were not included in her administrative charges. See Cheek v. Western & Southern Life Ins. Co., 31 F.3d 497, 500 (7th Cir. 1994). An employee filing an administrative charge need not allege with relentless specificity every fact or claim that forms the basis for her complaint, see Taylor v. Western & Southern Life Ins. Co., 966 F.2d 1188, 1195 (7th Cir. 1992), in part because filing a charge of discrimination with the EEOC is not a jurisdictional prerequisite, see Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982); Cheek, 31 F.3d at 500. Nonetheless, an allegation raised in a federal discrimination complaint must be "like or reasonably related" to the allegations raised in the charges: that is, there must be a "reasonable relationship" between them, such that "the claim in the complaint can reasonably be expected to grow out of" the subsequent EEOC investigation. Id.; see also Oates v. Discovery Zone, 116 F.3d 1161, 1168 n.7 (7th Cir. 1997); McKenzie, 92 F.3d at 481-82; Harper v. Godfrey Co., 45 F.3d 143, 147-48 (7th Cir. 1995); Weiss v. Coca-Cola Bottling Co., 990 F.2d 333, 337 (7th Cir. 1993). At a minimum, the charge and the complaint must "describe the same conduct and implicate the same individuals." Cheek, 31 F.3d at 501; see also McKenzie, 92 F.3d at 481; Harper, 45 F.3d at 148.

Ms. Benedict failed to raise her 1995-96 transfer denials in her October 1, 1995, EEOC charge of retaliation, though they apparently took place shortly before her filing. Because there is no indication that these incidents were "like or reasonably related" to the denial of her Title I position at Randall, McKenzie, 92 F.3d at 481, 483; Harper, 45 F.3d at 148, she has failed to exhaust her administrative remedies with respect to these incidents, see Cheek, 31 F.3d at 500. They were thus not properly raised in the district court.

Ms. Benedict also complains of her treatment at Lincoln School during the fall of 1995: she was excluded from a mid-October 1995, career-enhancing workshop, and her principal requested that Ms. Benedict's colleagues put their expectations of her into writing. Given the broad scope of conduct this circuit is willing to consider retaliatory, it is possible (without here deciding) that her treatment could be considered sufficiently adverse to warrant federal protection: placing an employee on the back of the workplace shelf is not necessarily conduct that falls beyond the federal reach. See, e.g., Dahm, 60 F.3d at 257; Collins, 830 F.2d at 702-06; see also Strother v. Southern Calif. Permanente Med. Group, 79 F.3d 859 (9th Cir. 1996) (exclusion from a series of seminars, meetings and administrative positions sufficiently adverse). Moreover, the temporal proximity of her treatment to the August filing of her federal complaint and the October filing of her administrative charges might be sufficient at the summary judgment phase to permit an inference of causality. See McClendon, 108 F.3d at 796-97; Rabinovitz, 89 F.3d at 489. Nonetheless, there is nothing to suggest that but for her filings she would not have been treated as she was, see Gleason, 118 f.3d at 1146; McKenzie, 92 F.3d at 483, or that her treatment implicated "the same individuals" identified in prior incidents, Cheek, 31 F.3d at 501; see also McKenzie, 92 F.3d at 481. Without evidence that the Lincoln claim was like or reasonably related to her prior charges, see Cheek, 31 F.3d at 500-01, Ms. Benedict has failed to exhaust her administrative remedies, the condition precedent to bringing an allegation of

discrimination into federal court, see McKenzie, 92 F.3d at 482.

Finally, employees claiming discrimination must timely file their charges: in this case, because Ms. Benedict cross-filed her EEOC charges with the ERD, within three hundred days of the allegedly discriminatory incident. See 29 U.S.C. §626(d)(2); 42 U.S.C. §12117(a) (incorporating Title VII's charge-filing requirements); Huels v. Exxon Coal U.S.A., Inc., 121 F.3d 1047, 1049 (7th Cir. 1997) (ADA); Thelen v. Marc's Big Boy Corp., 64 F.3d 264, 267-69 (7th Cir. 1996) (ADEA). Ms. Benedict filed her charge of age and disability discrimination on May 13, 1994: the three-hundred day period reaches back only until mid-July, 1993. Her treatment at Boyd is thus untimely raised. Neither has Ms. Benedict carried her evidentiary burden to come forward with admissible evidence that her treatment was part of a continuing violation. See Huels, 121 F.3d at 1049-50; Russell, 51 F.3d at 68, 70-71.

CONCLUSION

Many of Ms. Benedict's allegations are barred from appellate review for the reasons noted above. With respect to the claims that are properly before this court, Ms. Benedict has failed to establish that she suffers from a disability that substantially limits her participation in a major life activity or that she was the victim of age discrimination. Ms. Benedict has likewise failed to come forward with sufficient evidence to suggest that ECPS retaliated against her for her prior EEOC filings. Based on the record before this court, then, the district court did not err in granting summary judgment for ECPS. The decision of the district court is therefore AFFIRMED.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

March 5, 1998.

Before

Hon. Jesse E. Eschbach, Circuit Judge

Hon. Kenneth F. Ripple, Circuit Judge

Hon. Ilana Diamond Rovner, Circuit Judge

SANDRA L. BENEDICT, Plaintiff/Appellant,	Appeal from the United States District Court for the Western District of Wisconsin
No. 97-2513	
v.	No. 95-C-0568
EAU CLAIRE PUBLIC SCHOOLS, RICK SAVOLAINEN, TOM FIEDLER, et al., Defendants/Appellees.	John C. Shabaz, Chief Judge.

ORDER

On consideration of the petition for rehearing filed by the plaintiff-appellant on February 19, 1998, the judges on the panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

March 6, 1998.

Hon. Kenneth F. Ripple

SANDRA L. BENEDICT, Plaintiff/Appellant,	Appeal from the United States District Court
No. 97-2513	for the Western District of Wisconsin
v.	No. 95-C-0568
EAU CLAIRE PUBLIC SCHOOLS, RICK SAVOLAINEN, TOM FIEDLER, et al., Defendants/Appellees.	John C. Shabaz, Chief Judge.

ORDER

This case is before the court on Ms. Benedict's motion to stay the mandate of this court pending her filing a petition for certiorari in the Supreme Court of the United States. The applicable standards for consideration of such a motion are set forth in United States v. Holland, 1 F.3d 454 (7th Cir. 1993) (Ripple, J., in chambers).

The motion does not state specifically the issues which Ms. Benedict intends to present to the Supreme Court. Nor has she made a substantial showing that she will raise an important issue that warrants review in that Court. Accordingly, the motion for stay of mandate must be denied.

MOTION FOR STAY DENIED

UNITED STATES of America, Plaintiff-Appellee,
v.
JANET K. HOLLAND, Defendant-Appellant.

No. 92-2830.

United States Court of Appeals,
Seventh Circuit.

Argued April 6, 1993

Decided April 29, 1993.
Motion To Recall And Stay The Mandate July 1, 1993.

Defendant was convicted in the United States District Court for the Southern District of Indiana, Sarah Evans Barker, J., of 17 counts of knowingly making false statement to federally insured institution for purpose of influencing its actions. On appeal, the Court of Appeals, 992 F.2d 687, affirmed. On defendant's application for recall of mandate and for stay of that mandate, the Court of Appeals, Ripple, Circuit Judge, held that: (1) defendant presented no grounds to justify her failure to request stay before release of mandate, and (2) defendant did not present adequate grounds for stay of mandate pending filing of petition for certiorari.

Motion denied.

[1] FEDERAL COURTS ⇒ 956.1
170Bk956.1
Formerly 170Bk956
Court has inherent power to recall its mandate in order to protect integrity of its own processes, but mandate ought to be recalled only in exceptional circumstances.

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[2] FEDERAL COURTS ⇒ 453
170Bk453
Appellant presented no grounds to justify her failure to request stay before release of mandate, but even if she were unable to justify recall of mandate, she did not present adequate grounds for stay of that mandate pending filing of petition for certiorari in Supreme Court. F.R.A.P.Rule 41(b), 28 U.S.C.A.

[3] FEDERAL COURTS ⇒ 453
170Bk453
On motion for stay of mandate pending filing of petition for certiorari in Supreme Court, inquiry must center on whether applicant will suffer irreparable injury and whether applicant has reasonable probability of succeeding on the merits. F.R.A.P. Rule 41(b), 28 U.S.C.A.

*455 Christina McKee, Asst. U.S. Atty. (argued), Indianapolis, IN, for U.S.

James R. West, New Albany, IN, Belle T. Choate (argued), Robert C. Perry, Katharine C. Liell, Indianapolis, IN, for defendant-appellant.

Before RIPPLE, Circuit Judge (in chambers).

This motion is before me on application of the appellant for recall of this court's mandate and for stay of that mandate pending the disposition of a petition for a writ of certiorari in the Supreme Court of the United States. For the reasons set forth in the following chambers opinion, the relief requested is denied. Because the issue of the applicable standards for recall of the mandate and for stay of the mandate frequently confronts practitioners, I have decided to rule on this matter by published opinion. See Connecticut Gen. Life Ins. Co. v. Chicago Title & Trust Co., 690 F.2d 115 (1982), cert. denied, 464 U.S. 999, 104 S.Ct. 502, 78 L.Ed.2d 693 (1983). [FN1]

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FN1. In order to provide the parties with a ruling as quickly as possible, the opinion was released initially in typescript.

The appellant was convicted in the United States District Court for the Southern District of Indiana of seventeen counts of knowingly making a false statement to a federally insured institution for the purpose of influencing its actions in violation of 18 U.S.C. §§1014 and 2. After the imposition of sentence, the appellant took an appeal to this court. The execution of the sentence to imprisonment was stayed by the district court pending the disposition of the appeal in this court. The correctness of that decision is not before us. On April 29, 1993, this court affirmed the judgment of the district court in all respects, 992 F.2d 687. A subsequent petition for rehearing and suggestion for rehearing en banc was denied by this court on May 28, 1993. The mandate of the court issued on June 7, 1993.

The appellant must overcome two hurdles if the relief requested is to be granted. First, there must be an adequate showing that the mandate ought to be recalled. Second, there must be an adequate showing that the mandate, if recalled, ought to be stayed. The appellant has not made an adequate showing with respect to either of these matters.

[1][2] The Federal Rules of Appellate Procedure provide that the mandate of this court shall issue seven days after the entry of an order denying the petition for rehearing. See Fed.R.App.P. 41(a). The appellant sought no stay before the issuance of the mandate. It is well-established that, while it is within the inherent power of the court to recall its mandate in order to protect the integrity of its own processes, the mandate ought to be recalled only in exceptional circumstances. Patterson v. Crabb, 904 F.2d 1179, 1180 (7th Cir. 1990). For instance, this court has recalled its mandate when it discovered that it had misread the record and, consequently, dismissed an

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appeal erroneously on jurisdictional grounds, thus depriving the parties of the right to appeal. See id. Similarly, a subsequent decision of the Supreme Court calling into serious question the correctness of the court's judgment has been held to justify the recall of the mandate. See Zipfel v. Halliburton Co., 861 F.2d 565 (9th Cir. 1988). The appellant presents no such grounds here to justify her failure to request a stay before the release of the mandate.

[3] Even if the appellant were able to justify the recall of the mandate, she does not present adequate grounds for the stay of that mandate pending the filing of a petition for certiorari in the Supreme Court of the United States. Rule 41(b) of the Federal Rules of Appellate Procedure authorizes a court of appeals to issue such a stay. Relief is not, however, a matter of right but of sound judicial discretion. The rule in its present form does not set forth the criteria that ought to guide the exercise of that discretion. Our local rules simply require that a "substantial showing" be made that the petition for certiorari will raise "an important question meriting review by the Supreme Court." Cir.R. 41(a)(3). The foremost treatise in this area states that "[a] stay is a form of temporary injunction, and in general is governed by the same principles, modified to some extent because the application is made after the case has already been lost in at least one court." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE §17.19 (6th ed. 1986). Therefore, the inquiry must center on whether the applicant will suffer irreparable injury and whether the applicant has a reasonable probability of succeeding on the merits. In the context of a petition for a writ of certiorari, this second criteria requires, as our local rule indicates, albeit somewhat laconically, an estimation as to whether there is a reasonable probability that four Justices will vote to grant certiorari and a reasonable possibility that five will vote to reverse the judgment of this court. Justice Brennan discussed the interrelationship of these factors in his chambers opinion in

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Rostker v. Goldberg, 448 U.S. 1306, 1308, 101 S.Ct. 1, 3, 65 L.Ed2d 1098 (1980):

> Relief ... is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below – both on the merits and on the proper interim disposition of the case – are correct .... In a case like the present one, this can be accomplished only if a four-part showing is made. First, it must be established that there is a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction.... Second, the applicant must persuade [the Circuit Justice] that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous.... Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay.... And fourth, in a close case it may be appropriate to "balance the equities" – to explore the relative harms to applicant and respondent, as well as the interests of the public at large.

Other justices have articulated the same standards in formulations that differ slightly in form, but not in substance. See Barnes v. E-Systems, Inc. Group Hosp. Medical & Surgical Ins. Plan, 501 U.S. 1301, 112 S.Ct. 1, 115 L.Ed.2d 1087 (1991) (Scalia, J., in chambers); Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301, 95 S.Ct. 1, 42 L.Ed.2d 17 (1974) (Powell, J., in chambers). As the treatise cited above notes, judges of the lower courts are to apply the same criteria. STERN at §17.19. The judicial inquiry is the same.

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In this case, our inquiry need go no further than an examination of the issues that the appellant proposes to present to the Supreme Court. First, the appellant submits that the decision of this court is in conflict with the decision of the Tenth Circuit in United States v. Kramer, 500 F.2d 1185 (10th Cir. 1974). A conflict among the circuits is an accepted basis for the granting of the writ of certiorari. See Supreme Court Rule 10(a). Here, however, there is no division among the circuits. The appellant's contention was answered succinctly by the government in its brief on the merits:

> In United States v. Kramer, 500 F.2d 1185 (10th Cir. 1974), a bank president made a loan within his lending authority after receiving a false financial statement. In reversing his conviction under Section 1014 the court found that the evidence failed to show that he was aware the financial statement was false, that the statement was necessary for approval of the loan, or that the bank president required a financial statement before he exercised his discretion to make a loan within the bank's established lending limit. Id. at 1187.
>
> The facts in Kramer are not the facts in this case. Defendant here was charged with placing fictitious names on promissory notes for the purpose of allowing money to be lent to a person who had reached his lending limit with the bank. The defendant knew the names were fictitious, the promissory notes were a necessary part of the loan process, and the actual recipient of the money had reached the limit of what he could borrow in his own name.

Appellee's Br. at 17-18. The appellant's contention that Kramer is controlling is so wide of the mark that this court did

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not give it independent treatment in its opinion. The second proposed issue, inadequacy of counsel was thoroughly examined by the court during its consideration of the merits and presents no novel issue requiring further review by the Supreme Court.

Accordingly, the motion for recall of the mandate and for a stay pending the filing of a petition for a writ of certiorari is DENIED.

DENIED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SANDRA LEA BENEDICT,

Plaintiff,

v.

MEMORANDUM
AND ORDER

EAU CLAIRE PUBLIC
SCHOOLS, TOM BLOUNT
and MICHAEL BURKE,

95-C-568-S

Defendants.

Plaintiff Sandra Lea Benedict commenced this civil action pursuant to the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA) and Title VII. Plaintiff alleges that she was discriminated against by defendant Eau Claire Public Schools on the basis of her disability and age and retaliated against for filing a discrimination complaint.

On February 9, 1996 defendant Eau Claire Public Schools filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, an affidavit and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is

entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendant's motion for summary judgment the court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Sandra Lea Benedict is an adult resident of Eau Claire, Wisconsin. Her birth date is August 8, 1949. Defendant Eau Claire Public Schools is a Wisconsin public school district.

Plaintiff has been continuously employed by the defendant as a remedial studies teacher since 1972 or 1973 pursuant to individual written teacher's contracts. She is a member of the local teachers' union and her employment is and has been subject to the terms and conditions of the collective bargaining agreements signed by the labor union and the District. No express teaching assignment of duties is set forth in these individual contacts. The assignment of duties is

reserved to the discretion of the School District pursuant to the management rights clause of the various labor contracts and the needs of the District. Plaintiff has been assigned to various schools within or associated with the District as a Chapter One or Title 1 teacher of remedial studies.

On September 25, 1986 plaintiff was involved in a car accident in which she sustained injuries to her shoulders, neck and head. As a result of the accident she suffered and continues to suffer chronic injury. In 1988 she was diagnosed by Dr. Louis H. Friedler as demonstrating significant residual problems from the accident including post-traumatic stress disorder, chronic fibromyositis and chronic end-organ vestibulopathy. Due to her continuing physical and emotional injury resulting from the car accident plaintiff took a medical leave of absence from teaching in the fall of 1990. Plaintiff was determined to be medically able to resume teaching in the winter of 1991 and did so.

During the course of her employment by the defendant plaintiff has not suffered a material loss of benefits and has received pay increases. Plaintiff's duties have not been decreased or materially changed by the defendant.

In May 1994 plaintiff filed with the Equal Employment Opportunity Commission (EEOC) ADEA and ADA claims. She filed a retaliation claim with the EEOC in October 1995.

MEMORANDUM

Plaintiff claims that defendant Eau Claire Public Schools violated the Americans with Disabilities Act (ADA). The ADA prohibits discrimination against a qualified individual with a disability. 42 U.S.C. §12112 (a). A disability is defined as a physical impairment which substantially limits one or more of a person's major life activities. 42 U.S.C. §12102(2). These activities include caring for oneself,

performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 C.F.R. §1630.2 (j).

To prevail on her ADA claim plaintiff must establish that she is a disabled person within the meaning of the Act; that she is able to perform the essential functions of the job with or without reasonable accommodations and that the employer adversely affected her employment because of her disability. White v. York International Corporation, 45 F. 3d 357, 360-61 (10th Cir. 1995).

In Roth v. Lutheran General Hospital, 57 F. 3d 1446, 1454, (7th Cir. 1995), the Court held that the plaintiff must meet the threshold burden of establishing that he or she is disabled within the meaning of the Act. The Court stated:

> An individual is "disabled" if he (or she) has (1) a physical or mental impairment which substantially limits one or more of the major life activities; (2) a record of such impairment; or (3) if he (or she) is regarded as having such an impairment. 29 U.S.C. §706(8) (B); 29 C.F.R. §1613.702(a); 42 U.S.C. §12102(2); 29 C.F.R. §1630.2(g).

Defendant argues that plaintiff is not disabled within the meaning of the ADA because she does not have a physical or mental impairment that substantially limits her life's major activities.

Plaintiff has not met her threshold burden of showing that she has a disability under the Act. She has failed to show that she has an impairment which significantly limits any of her major life activities. Since plaintiff has not met her burden to show she has a disability she cannot prevail on a claim under the ADA. Accordingly, the motion of defendant Eau Claire Public Schools for summary judgment on this claim will be granted.

Plaintiff also claims that she was discriminated against because of her age by defendant Eau Claire Public Schools. To establish a violation of the ADEA plaintiff must prove that "but for" her age she would not have suffered a materially adverse change in the terms or conditions of her employment. Dorsch v. L.B. Foster Co., 782 F. 2d 1421, 1424 (7th Cir. 1986). This change has been defined as follows:

> [A] material adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

Crady v. Liberty National Bank & Trust Co., 993 F.2d 132, 136 (7th Cir. 1993).

Although plaintiff alleged in her complaint that she was not rehired by the school district because of her age and not hired at certain schools, the undisputed facts do not support these allegations. Plaintiff was continually employed by the school district and suffered no demotion nor decrease in wages or responsibilities. She was not assigned to schools where she wished to teach including Putnam, Northwoods, Sherman and Locust Lane Schools. This is not an adverse change in the conditions of her employment. Plaintiff has not demonstrated that the defendant adversely changed the conditions of her employment because of her age. The motion of defendant Eau Claire Public Schools for summary judgment on plaintiff's age discrimination claim will be granted.

Plaintiff also claims that she was retaliated against by the defendant Eau Claire Public Schools for filing a discrimination claim. To establish a prima facie claim of retaliation plaintiff must prove that (1) she engaged in a protected activity; (2) that an adverse employment action occurred and (3) that there exists a causal link between the protected expression and the adverse action. Brenner v. Brown, 36 F. 3d 18 (7th Cir. 1994). It is undisputed that plaintiff filed a discrimination complaint with the EEOC in 1994. She has not shown, as discussed above, that she suffered any adverse employment action. Accordingly, she cannot show a causal connection between her protected expression and any adverse action. Defendant Eau Claire Public Schools is entitled to judgment in its favor on plaintiff's retaliation claim.

The motion of defendant Eau Claire Public Schools for summary judgment on all plaintiff's claims will be granted. Plaintiff's claims against defendants Tom Blount and Michael Burke remain.

Benedict v. Eau Claire Public Schools, et al., 95-C-568-S

ORDER

IT IS ORDERED that the motion of defendant Eau Claire Public Schools for summary judgment is GRANTED.

Entered this 19th day of March, 1996.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SANDRA LEA BENEDICT,

Plaintiff,

v.

MEMORANDUM
AND ORDER

EAU CLAIRE PUBLIC
SCHOOLS, TOM BLOUNT
and MICHAEL BURKE,

95-C-568-S

Defendants.

On March 19, 1996 the Court granted the motion of defendant Eau Claire Public Schools for summary judgment. On March 29, 1996 plaintiff moved reconsideration. This motion has been fully briefed and is ready for decision.

Plaintiff contends that the Court erred because it found that whether she was disabled within the meaning of the ADA is a threshold burden. In Roth v. Lutheran General Hospital, 57 F. 3d 1446, 1454, (7th Cir. 1995), the Court held that the plaintiff must meet the threshold burden to establish that he or she is disabled within the meaning of the Act. The Court stated:

> Roth must meet the threshold burden of establishing that he (or she) is "disabled" within the meaning of the statutes. As the district court properly observed, the inquiry is an individualized one, and must be determined on a case by case basis. (Citations omitted).

> An individual is "disabled" if he (or she) has (1) a physical or mental impairment which substantially limits one or more of the major life activities; (2) a record of such impairment; or (3) if he (or she) is regarded as having such an impairment. 29 U.S.C. §706(8)(B); 29 C.F.R. §1613.702(a); 42 U.S.C. §12102 (2); 29 C.F.R. §1630.2 (g).

In her reply brief plaintiff concedes that she has this burden but has raised no genuine issue of material fact to show that she has an impairment which significantly limits any of her major life activities.

Second, plaintiff contends that the Court erred in requiring her to prove each element of her prima facie age discrimination and retaliation claims rather than to merely raise a genuine issue of material fact. She argues that she has raised a genuine issue of material fact concerning whether or not she suffered an adverse employment action, but, again, has failed to submit any evidence to support this issue. The undisputed facts demonstrate that she suffered no adverse change in the conditions of her employment as defined in Crady v. Liberty National Bank & Trust Co., 993 F.2d 132, 136 (7th Cir. 1993). She has failed to raise any genuine issue concerning a material adverse employment action.

Third, plaintiff contends the Court failed to consider the abundance of evidence that she presented to establish a genuine issue of material fact. The evidence which the Court carefully considered fails to raise a dispute as to any genuine issue of material fact. Accordingly, plaintiff's motion for reconsideration will be denied.

Benedict v. Eau Claire Public Schools et al., 95-C-568-S

ORDER

IT IS ORDERED that plaintiff's motion for reconsideration is DENIED.

Entered this 24th day of April, 1996

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SANDRA LEA BENEDICT,

Plaintiff,

ORDER

v.

EAU CLAIRE PUBLIC SCHOOLS, TOM BLOUNT and MICHAEL BURKE,

95-C-568-S

Defendants.

Request of defendant Eau Claire Public Schools for the entry of judgment in its favor pursuant to this Court's order for summary judgment dated March 19, 1996 came on to be heard by telephone in the above entitled matter on October 2, 1996, the plaintiff having appeared in person and by Lawton & Cates by Victor Arellano and by Thomas D. Arnot; the defendant Eau Claire Public Schools by Weld, Riley, Prenn & Ricci by Joel L. Aberg and belatedly with a call to the Court the individual defendants Blount and Burke by Kravit, Gas & Weber by John D. Finerty, Jr. The Hon. John C. Shabaz, District Judge, presided.

The Court notes as did the Court of Appeals that it is unclear whether the claims against all defendants have been resolved.

The Court having determined that the stipulation for dismissal refers only to the defendants Tom Blount and

Michael Burke now grants the request of the defendant Eau Claire Public Schools.

Accordingly,

Benedict v. Eau Claire Public Schools, et al., 95-C-568-S

ORDER

IT IS ORDERED that judgment be entered pursuant to the Memorandum and Order of this Court dated March 19, 1996 granting judgment to the defendant Eau Claire Public Schools against the plaintiff Sandra Lea Benedict dismissing plaintiff's complaint and all claims contained therein with prejudice and costs.

Entered this 2nd day of October, 1996.

BY THE COURT:

/s/ John C. Shabaz
JOHN. C. SHABAZ
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SANDRA LEA BENEDICT,

Plaintiff,

ORDER

v.

EAU CLAIRE PUBLIC SCHOOLS, TOM BLOUNT, MICHAEL BURKE, RICK SAVOLAINEN, TOM FIEDLER, WFT LABOR UNION, MARY MILLBRANDT, LYNN MCNISH, MARVIN LANSING, CLIFF STANFORD, THOMAS GUELZOW, GEORGE SENTENEY, LEE HANSEN, JOHN FLYNN, KIM HILL-PHELPS, JANE ROBERTSON-JOHNSON, MARY SEITZ, ESTA MATTICE and JEAN SCHIFFER,

95-C-568-S

Defendants.

Judgment for dismissal was entered in the above entitled matter on October 3, 1996 in favor of defendant Eau Claire Public Schools. On May 24, 1996 the motion of defendants Dr. Lee Hansen, Rick Savolainen, Tom Fiedler, Dr. John Flynn, Kim Hill-Phelps, Jane Robertson-Johnson, Mary Seitz, Lynn McNish, Esta Mattice, Jean Shiffer and Mary Millbrandt to dismiss plaintiff's complaint was granted.

Plaintiff also named WFT Labor Union, Marvin Lansing, Cliff Stanford, Thomas Guelzow and George Senteney as defendants on August 25, 1995 for whom there is

no proof of service. More than 120 days has elapsed since this action was filed. Accordingly, these defendants will be dismissed for plaintiff's failure to perfect service. Rule 4(m), Federal Rules of Civil Procedure.

Judgment will be amended entering judgment of dismissal against plaintiff in favor of defendants Dr. Lee Hansen, Rick Savolainen, Tom Fiedler, Dr. John Flynn, Kim Hill-Phelps, Jane Robertson-Johnson, Mary Seitz, Lynn McNish, Esta Mattice, Jean Shiffer and Mary Millbrandt with prejudice and dismissing defendants WFT Labor Union, Marvin Lansing, Cliff Stanford, Thomas Guelzow and George Senteney without prejudice for plaintiff's failure to serve them in a timely manner.

ORDER

IT IS ORDERED that amended judgment be entered in favor of defendants Dr. Lee Hansen, Rick Savolainen, Tom Fiedler, Dr. John Flynn, Kim Hill-Phelps, Jane Robertson-Johnson, Mary Seitz, Lynn McNish, Esta Mattice, Jean Shiffer and Mary Millbrandt against plaintiff Sandra Lee Benedict DISMISSING plaintiff's complaint and all claims contained therein with prejudice and costs and DISMISSING defendants WFT Labor Union, Marvin Lansing, Cliff Stanford, Thomas Guelzow and George Senteney without prejudice.

Entered this 7th day of May, 1997.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SANDRA LEA BENEDICT,

Plaintiff,

ORDER

v.

EAU CLAIRE PUBLIC SCHOOLS, TOM BLOUNT, MICHAEL BURKE, RICK SAVOLAINEN, TOM FIEDLER, WFT LABOR UNION, MARY MILLBRANDT, LYNN MCNISH, MARVIN LANSING, CLIFF STANFORD, THOMAS GUELZOW, GEORGE SENTENEY, LEE HANSEN, JOHN FLYNN, KIM HILL-PHELPS, JANE ROBERTSON-JOHNSON, MARY SEITZ, ESTA MATTICE and JEAN SCHIFFER,

95-C-568-S

Defendants.

On May 8, 1997 a final order was entered in this case dismissing all claims. On June 10, 1997 plaintiff's motion to reopen the case and to amend the complaint was denied. On June 17, 1997 plaintiff filed a notice of appeal and paid the filing fee. She also filed a motion for permission to file an interlocutory appeal. This request will be denied as moot because a final order has been entered in this matter.

ORDER

IT IS ORDERED that plaintiff's motion to file an interlocutory appeal is DENIED as moot.

Entered this 17th day of June, 1997.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT
EQUAL RIGHTS DIVISION

Sandra L. Benedict
1347 Elderberry Lane
Eau Claire, WI 54701

Complainant,

v.

DECISION AND ORDER

Eau Claire Public Schools
500 Main Street
Eau Claire, WI 54701

ERD Case No. 199504328
EEOC Case No. 260960026

Respondent.

This case comes before the Administrative Law Judge on the Respondent's motion to dismiss on grounds of *res judicata* and on the Complainant's responsive motion to have the case put into abeyance. For the reasons stated below, the Complainant's motion is denied, the Respondent's motion is granted, and this matter is dismissed with prejudice.

Briefly, the pertinent facts are as follows. Sandra Benedict filed a charge with the Equal Employment Opportunities Commission (EEOC) in May 1994, then filed a second charge in October 1995, alleging that the Eau Claire Public Schools refused to re-hire her for the 1995-1996 school year on the basis of her age and disability, and in retaliation for having filed the earlier discrimination charge. She alleged that the school district violated her rights under the federal Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA). Her complaint was cross-filed with the Wisconsin Equal Rights Division (ERD).

In January 1996, the EEOC dismissed her charge because she had filed a complaint on these issues in federal district court under the ADEA and the ADA. In court, the school district moved for summary judgment, and in March 1996 the court granted the motion, concluding that Benedict could not show she had a disability under the ADA, and failed to show that she suffered an adverse change in the conditions of her employment, as would be necessary to establish an age discrimination or retaliation claim.

Meanwhile, the charge filed with the ERD proceeded through investigation of the allegations that the school district discriminated on the basis of age, disability and retaliation under the Wisconsin Fair Employment Act (WFEA) concerning the nonrenewal of Benedict's teaching contract in June 1995, and concerning certain comments alleged to have been made by school principal Seitz regarding Benedict's problems with the steps at Randall School. An Initial Determination finding no probable cause to believe the allegations was issued on June 6, 1996. Benedict appealed this determination, and the case was scheduled for an administrative hearing on the issues of whether the school district discriminated against Benedict in the terms and conditions of her employment because of age and handicap, or discriminated against her because she had made a complaint under the WFEA.

[Notation, handwritten on top of page: No "final" judgment had taken place as of Oct. 2, 1996, so therefore dismissal *res Judica* [sic] may well be premature as of that date.]

Meanwhile, on October 2, 1996 the federal district court issued its judgment dismissing the federal lawsuit, and Benedict is now pursuing an appeal to the Seventh Circuit.

Based on the dismissal of the federal claims by the federal district court, the school district seeks to have the ERD

complaint dismissed on grounds of *res judicata*, or claim preclusion. In order to bar a claim on the basis of a previous adjudication, it is necessary that there be: 1) a previous judgment on the merits; 2) an identity of parties in the two actions; and 3) an identity of causes of action. DePratt v. West Bend Mutual Insurance Co., 113 Wis.2d 306, 334 N.W.2d 883 (1983).

It is obvious that there is an identity of parties between the federal case and this one. Benedict is the Complainant herein and the plaintiff in the federal action, and the school district is the Respondent herein and one of the defendants in the federal action.

As to whether there has been a judgment on the merits, it appears that the granting of a summary judgment in the school district's favor went to the merits of Benedict's case, even though it resulted in a pretrial disposition. There is a clear consensus in both the Labor and Industry Review Commission and the Wisconsin appellate courts that a judgment on the merits does not require a trial. Maguire v. Marquette University (LIRC, 08/18/88); Byrne v. West Allis-West Milwaukee School District (LIRC, 09/18/91); Bourque v. Wausau Hospital Center (LIRC, 04/02/92); DePratt, supra at 311. In Maguire, LIRC looked to the Seventh Circuit for guidance in determining what a judgment on the merits was for purposes of *res judicata:*

> In Harper Plastics v. Amoco Chemicals Corp., 657 F.2d 939, 943 (7th Cir. 1981), the court stated that, "For the purpose of *res judicata*, the definition of a judgment on the merits is one which 'is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction, or form.' Fairmont Aluminum Co. v. Comm'r, 222 F.2d 622 (4th Cir.), cert. denied, 350 U.S. 838, 76 S.Ct. 76, 100 L.Ed. 748 (1955).

The Order of Judge Shabaz granting summary judgment in Benedict's federal case was clearly based on an assessment of Benedict's legal rights, and was not a matter of practice, procedure, jurisdiction or form. It was, therefore, a judgment on the merits for purposes of *res judicata*.

As to the issue of whether there is an identity of causes of action, in 1983 the Wisconsin Supreme Court in DePratt, *supra*, adopted the "transactional rule" of *res judicata* as found in the Restatement (Second) of Judgments, §§24 and 25[1], by

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[1] These two sections read as follows:

> **§24. Dimensions of "claim" for Purposes of Merger or Bar-General Rule Concerning "Splitting"**
>
> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger of bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be decided pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.
>
> §25 **Exemplifications of General Rule Concerning Splitting**
>
> The rule of §24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action
>
> (1) To present evidence or grounds or theories of the case not presented in the first action, or
>
> (2) To seek remedies or forms of relief not demanded in the first action.

which a basic fact situation ordinarily would give rise to only a single cause of action, no matter how many different legal theories or bases of relief might exist. Applied to employment discrimination law, this has meant that dispositions against plaintiffs on the merits of Title VII claims and other federal employment discrimination claims have barred those plaintiffs from pursuing claims based on the WFEA in state administrative proceedings, if the claims arose out of the same fact situation as the federal claims. Schaeffer v. State Personnel Commission, 150 Wis2d 132, 441 N.W.2d 292 (Ct. App.1989); Maguire, supra; Bourque, supra.

Then came the decision of the Wisconsin Court of Appeals in Parks v. City of Madison, 171 Wis.2d 730 ___ N.W.2d ___ (Ct. App. 1992). In Parks, the court had before it a motion to dismiss based on *res judicata*. The Court denied the motion, relying on an exception in one of the comments to the Restatement:

> If...the court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would clearly have declined to exercise it as a matter of discretion), then a second action in a competent court presenting the omitted theory or ground should be held not precluded. Restatement (Second) of Judgments §25 cmt. e (1982).

Id. at 736.

In Parks, the plaintiff was attempting to maintain a mandamus action in state court alleging that the City of Madison had illegally removed him from the position of affirmative action officer. He had brought a number of prior actions for which there were judgments on the merits against him, but the one relevant to this case was a federal court action Parks had brought, alleging that his suspension and removal violated

federal civil rights laws and was also improper under Wisconsin law (the decision does not specify which state claims were appended to the federal case). The federal court granted the City's motion for summary judgment as to the federal claims and dismissed the pendent state claims without prejudice.

Even though the claim sought to be extinguished in Parks was a mandamus action, not an action under the WFEA,[2] the case does raise the question of whether the exception in the Restatement ought to apply to a case brought under the WFEA. it does seem clear, after all, that a federal court would not have jurisdiction over a WFEA claim, because remedies under the WFEA can be pursued *only* through the state procedure established in §111.33, Wis. Stats, Bachand v. Connecticut Genl Life Ins. Co., 101 Wis.2d 617, 625, 305 N.W.2d 149 (Ct. App. 1981); Waid v. Merrill Area Public Schools, 91 F.3d 857, 866 (7th Cir. 1996). The exception in the Restatement is straightforward enough--if the federal court clearly would not have jurisdiction of a theory of recovery that was omitted from the federal lawsuit, then a second action brought in the proper forum presenting that theory should not be precluded by *res judicata*.

Nevertheless, it is in keeping with the federal-state sharing of the enforcement of anti-discrimination laws to bar a state-based discrimination action that arises out of the same set of facts as the state-based action. Federal claims of discrimination under the ADA, ADEA, or Title VII are typically deferred because of specific federal policies to allow state agencies with analogous anti-discrimination laws to resolve those complaints first. See, e.g., 42 U.S.C. §2000e-5(d); 29 U.S.C. §633(b). Many states, including Wisconsin, have an agreement with the federal government whereby federal charges are cross-filed

[2] Parks itself made no reference to Schaeffer, so there is no direct word from the court as to how the two cases should be read together.

with the state and parties are referred to the state procedure during the federal deferral period. The idea behind the deferral and referral system between state and federal governments is to avoid a multiplicity of lawsuits on the issue of liability for employment discrimination. Implicit in this system is the idea that the federal and state charges of discrimination in employment that arise from a single set of facts are really the same claim. Even though, therefore, a federal district court may not have jurisdiction over a state-based discrimination claim arising out of the same facts, if it has entered judgment on the merits as to the federally based claim it essentially has ruled on the merits of the state-based claim as well, and the state proceeding should be barred, despite the language of comment e of §25 of the Restatement.

This position has support in the case of Patzer v. Board of Regents, 763 F.2d 851 (7th Cir. 1985). In Patzer, the employee argued that a judgment on the merits in a state-based discrimination claim ought to preclude a subsequent federal claim (the reverse of the situation here). The plaintiff argued that preclusion should not occur because he could not have pursued his federal Title VII claim in the state forum (essentially making the argument that the exception of comment e of §25 of the Restatement ought to apply).
The court disagreed:

> Patzer argues that this Title VII claim is not a matter that might have been litigated in the state court proceeding, because he could not have introduced it in the administrative proceeding or in the state court review; consequently, it is not barred. The fallacy in this argument is that the claim he makes in this Title VII suit is identical for purposes of res judicata to the claim he makes in the administrative proceedings; that claim has therefore already been litigated. The "might have been litigated" provision comes into play

> only for claims or causes of action distinct from the one actually litigated.

Id. at 854.[3]

Under the reasoning of Patzer, the exception in §25, comment e of the Restatement (Second) of Judgments should only operate to allow a second action to go forward if it is related to the first action, but not *identical* to it. So, In Parks, the state mandamus action, which was *related* to the federal civil rights action, and which arose out of the same fact situation, could go forward since the federal district court declined jurisdiction of it without deciding it. Here, however, Benedict's claim now being pressed in the ERD (age and handicap discrimination and retaliation affecting terms and conditions of employment and re-hiring for the 1995-1996 school year) is essentially the same as her claim in federal court. A comparison of the factual stipulation in federal court and the allegations of the ERD complaint confirms this.

In consideration of the above, the Respondent's motion to dismiss is granted, and the Complainant's motion to have this case put into abeyance is denied. Therefore the Administrative Law Judge hereby

---

[3] It should be noted that Patzer was a case in which the complainant prevailed in the state administrative process and on appeal in state court, and was seeking a supplemental remedy under Title VII (namely, back pay, which was not available from the state forum in 1973, when Patzer filed his complaint). While finding that the state court judgment would ordinarily be considered *res judicata*, the court held this case should be an exception, because Title VII was intended to be available to supplement awards that were limited by state anti-discrimination laws. This holding is consistent with a specific exception to *res judicata* in the Restatement (Second) of Judgments, §26(1) (c), which states that the general rule precluding a second action does not apply because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain...multiple remedies or forms of relief...and the plaintiff desires in the second action...to seek that remedy or form of relief."

ORDERS

That the complaint in this matter be dismissed with prejudice.

Dated at Milwaukee, Wisconsin, December 5, 1996.

/s/ John L. Brown
John L. Brown
Administrative Law Judge

cc: Sandra L. Benedict, Complainant
Eau Claire Public Schools, Respondent
Victor M. Arellano, Attorney for Complainant
James M. Ward, Attorney for Respondent
EEOC

CERTIFICATION

I, Irene Torres, for the Hearing Section of the Equal Rights Division, do hereby certify that the attached copy of the decision in the matter of Sandra L. Benedict v. Eau Claire Public Schools, ERD #199504328 issued on December 5, 1996 is an exact copy of the original decision on file with the Equal Rights Division.

/s/ Irene Torres
Irene Torres
Hearing Section
Equal Rights Division

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

ORDER OF DIMISSAL

IN THE CASE OF	**CLAIM FOR**
Sandra L. Benedict (Claimant)	Period of Disability and Disability Insurance Benefits
_____ (Wage Earner)	394-54-4287 (Social Security Number)

This case is before the Administrative Law Judge on the claimant's request for hearing dated December 23, 1997. On January 21, 1998 a fully favorable revised reconsideration determination was issued finding the claimant disabled since March 21, 1997.

The revised determined advised the claimant that if he or she disagreed with the revised determination, he or she had 30 days to request that we proceed with the pending request for hearing. The claimant has not requested that we proceed with the pending request for hearing. Accordingly, pursuant to Social Security Administration regulations 20 C.F.R. §§404.941(d) and 416.1441(d), the Administrative Law Judge dismisses the request for hearing. The revised consideration determination dated January 21, 1998 stands as the final decision of the Secretary.

Notice of this action is hereby given by mailing a copy to the claimant.

/s/ Jerome J. Berkowitz
Jerome J. Berkowitz
Administrative Law Judge

Date: March 20, 1998

CONSTITUTIONAL AND STATUTORY PROVISIONS

A) Section 1 of the 14th Amendment to the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B) 42 U.S.C.A. §1983:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

C) The Rehabilitation Act, 29 U.S.C.S. §794 (a):

Promulgation of nondiscriminatory rules and regulations; copies to appropriate committees. No otherwise qualified individual with a disability in the United States, as defined in section 7(8) [29 USCS §706 (8)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to

discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C.S. §623 (a) (1) provides:

> Employer practices. It shall be unlawful for an employer -- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

29 U.S.C.S. §623 (d) provides in relevant part:

> Opposition to unlawful practices; participation in investigations, proceedings, or litigation. It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment...because such individual...has opposed any practice made unlawful by this section, or because such individual...has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

42 U.S.C.S. §12102(2) provides:

> Disability. The term "disability" means, with respect to an individual--
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

42 U.S.C.S. §12111(8) provides in relevant part:

> Qualified individual with a disability. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

42 U.S.C.S. §12111(9) provides:

> Reasonable accommodation. The term "reasonable accommodation may include--
> (A) making existing facilities use by employees readily accessible to and usable by individuals with disabilities; and
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification or equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C.S. §12111(10) (A) provides:

> Undue hardship. In general. The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

42 U.S.C.S. §12112 (a) provides:

> General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or

discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C.S. §12112(b)(5)

Construction. As used in subsection (a), the term "discriminate" includes--

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.

42 U.S.C.S. §12203(a) provides:

Retaliation. No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

CITATIONS TO STATE/TERRITORIAL INCOMPETENCY STATUTE OF LIMITATIONS TOLLING PROVISIONS

Alabama Statutes 6-2-8 [A]; Alaska Statutes 9.10.140; Arizona Statutes 12-502; Arkansas Statutes 16-56-116; California Statutes - West's Ann.Cal. CCP §352; Colorado Statutes 13-81-103; Delaware Statutes 10-8116; District of Columbia Statutes 12-302; Florida Statutes 95.051; Georgia Statutes 9-3-90; Hawaii Statutes 657-8; Idaho Statutes 5-230; Illinois Statutes 735-5/13-112, 13-211; Indiana Statutes IC 34-1-2-5; Iowa Statutes 614.8, 614.19, 614.27; Kansas Statutes 60-515; Kentucky Statutes KRS 413.170; Louisiana OC 3468; Maine Statutes T. 14 §853; Maryland Statutes §5-201; Massachusetts Statutes C.260 §7; Michigan Statutes MCLA§600.5851, MSA §27A.5851; Minnesota Statutes 541.15; Mississippi Statutes 15-1-59; Missouri Statutes 516.030, 516.170; Montana Statutes 27-2-402; Nebraska Statutes 25-213; Nevada Statutes 11.250; New Hampshire Statutes C.508 §4,8; New Jersey Title 2A C.14 §21; New Mexico Statutes 37-1-10; New York Statutes C.P.L.R. §208; North Carolina Statutes 1-17, 1-19, 1-20; North Dakota Statutes 28-01-25; Ohio Statutes 2305-16; Oklahoma Statutes 12 §96; Oregon Statutes 12.170, 12.160; Rhode Island Statutes 9-1-19; South Carolina Statutes 15-3-40, 15-3-50; South Dakota Statutes 15-2-22; Tennessee Statutes 28-1-106; Texas Statutes CP&R 16.001; Utah Statutes 78-12-36; Vermont Statutes 12-551; Virginia Statutes 8.01-229; Virgin Islands 5-36; Washington Statutes 11.88; West Virginia Statutes C.55 Art 2 §15; Wisconsin Statutes 893.18, 893.16; Wyoming Statutes 1-3-114.

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APPENDIX B

Additional Supporting Documents

[Eau Claire Area School District Letterhead]

Title I
Rick Savolainen, Director
833-3460

Sandie Benedict
Title I Teacher
Lincoln School

TO: District Principals, Title I Staff, Central Office Administrators
FROM: Rick Savolainen
DATE: November 14, 1996
SUBJECT: Title I Audit

As the result of a complaint issued by an Eau Claire Area School District employee, the United States Department of Education, Office of the Inspector General sent two auditors to analyze our district's Title I program. The basic complaint was mishandling/misappropriating Title I funds. The auditors amassed a great deal of data covering a two-year (1994-96) period. They spent the weeks of October 7-11 and October 28-November 1, 1996, collecting information and interviewing district staff at the Central Office and several schools.

An exit conference was held on Friday, November 1, 1996, at the Central Office with the auditors, Drs. Klaus, Hittman, and myself. The auditors reported that they found no evidence to support the complainant's allegations of mishandling/misappropriating Title I funds. They did have some suggestions for our program which they will document in a follow-up letter.

I want to thank all of you who were involved with this matter and to let you know that your cooperation was greatly appreciated. More specific information concerning the auditor's visit will be forthcoming following receipt of their written report.

[United States Department of Education Letterhead]

March 27, 1997

Mr. William J. Erpenbach, Director
Equity and Title I
State of Wisconsin
Department of Public Instruction
P.O. Box 7841
Madison, Wisconsin 53702

Dear Mr. Erpenbach:

We have completed our review of allegations concerning the administration of the Title I program at the Eau Claire Area School District [District] in Eau Claire, Wisconsin. Our review was limited to determining whether the allegations have sufficient merit to warrant an audit by our office. Based on our review, some of the allegations may have merit. However, they are not significant enough to warrant an audit and do not involve misappropriation of Title I funds.

The Wisconsin Department of Public Instruction [WDPI] is responsible for monitoring Title I programs in Wisconsin. This letter and the accompanying attachments and schedules provide you with the issues we identified in our limited review. We ask that your office consider these issues in its monitoring of the District's Title I program. We will also send a copy of this letter to the District. Because we did not perform an audit, we are not recommending any financial liability. We bring these issues to your attention to ensure that title I funds are used in accordance with applicable regulations and improve the effectiveness of the District's Title I program.

To ensure that WDPI and District officials understand our concerns, we have made arrangements for a meeting on April 25, 1997 at WDPI's offices to discuss the content of this letter and answer any questions.

We identified three issues regarding the District's administration of the Title I program and have described them on page two and in more detail in the attachments and schedules to this letter.

Use of Title I Funds at Targeted Assistance Schools

The District must use Title I funds at targeted assistance schools to provide services only to eligible children identified as having the greatest need for special assistance rather than for overall school improvement. We refer to these children as (Title I children). Some expenditures at targeted assistance schools appeared to benefit the schools as a whole and were not targeted to benefit only Title I children. Details are contained in Attachment 1 and Schedule 1.

Title I Equipment Inventory

The District's equipment inventory system does not include all equipment purchased with Title I funds and does not indicate whether the equipment is being used for Title I purposes. The District maintains several equipment inventory listings. However, they do not contain all Title I equipment or indicate that the equipment is being used for Title I purposes. Details are contained in Attachment 2 and Schedule 2.

General Program Administration

We noted that general program administration needs to be strengthened. Details are contained in Attachment 3.

If you have any questions, please contact me or Kenneth Oba at 312/886-6503.

Sincerely,

/s/ Richard J. Dowd
Richard J. Dowd
Regional Inspector General
for Audit - Region V

cc: Rick Savolainen, Title I Director - ECASD
Richard Rasa - Director, Advisory and
Assistance Services, ESSP

Attachment 1 -
Use of Title I Funds at Targeted Assistance Schools

According to ED policy guidelines for Title I programs, targeted assistance schools must target Title I funds to provide services to children identified as having the greatest need for special assistance. Title I funds are not to be used for overall school improvement. Targeted assistance schools may not provide services to all children in the school or in particular grades.

We reviewed selected expenditures charged to Title I funds (see details on Schedule 1) and identified expenditures that appeared to benefit schools as a whole rather than just Title I children. Most of the expenditures were for the year ended June 30, 1996. In most instances, the District's documentation did not fully explain how the expenditures benefited only Title I children.

Following are examples of Title I expenditures that appear to benefit the school as a whole rather than just Title I children or were not adequately documented as related to Title I. We did not list all the examples our review disclosed.

> Northwoods Elementary School had 28 percent low income children. The school charged Title I funds ($20,542) for 90 percent of the cost of installing a computer network. The District did not document how the computer network primarily benefited only Title I children.
>
> Sam Davey Elementary School had 37 percent low income children. The school charged Title I funds ($6,250) for 100 percent of the cost of telephone installation. The District did not document how the telephone installation primarily benefited only Title I children.

The District requires all teachers to have a physical and criminal background check at the beginning of the school year. The District used $461 of Title I funds to pay for physicals and criminal background checks for six teachers. Even though the amount of money involved is minor, the issue is whether such costs should be paid from Title I funds because the costs were for something the District requires of all teachers.

The District transferred transportation costs of $7,953 from non-Title I funds to Title I funds but did not provide adequate documentation explaining why the costs should be charged to Title I.

Delong Middle School had 38 percent low income children. The school charged Title I funds ($4,650) for the entire cost for an outside speaker. The District did not document how the speaker only benefited Title I students.

Schedule 1 - Use of
Title I Funds at Targeted Assistant Schools

Schedule 1 table is not reproduced here, but notation on table appears below:

> The 15 items identified above are the purchase orders and journal entries we reviewed to determine if the purchases at targeted assistance schools were for the benefit of Title I students. In most instances, the documentation provided by the District did not fully explain how the expenditures benefited only Title 1 children.

Attachment 2 - Title I Equipment Inventory

The District's equipment inventory system does not include all equipment purchased with Title I funds and does not indicate whether the equipment is being used for Title I purposes. Schedule 2 illustrates that the equipment inventory records of the District, each school, and the Title I Director contain different information and do not include all the Title I equipment purchased.

According to 34 CFR Part 80.32 (d) (1), property records must be maintained that include a description of the property, serial number or other identification number, source of property, title holder, acquisition date and cost, percentage of Federal participation in the cost, location, use, and condition of the property, and any ultimate disposition data.

The District's A-128 audit report for the period ended June 30, 1993 stated that the District did not maintain an inventory of fixed assets. The management letter for the A-128 audit report for the year ended June 30, 1995 disclosed that the District still did not have an inventory of fixed assets purchased using Federal funds. The report recommended that the District develop a fixed asset inventory listing that is segregated for assets purchased using Federal sources. The management letter for the A-128 audit report for the year ended June 30, 1996 did not contain the same problem regarding Federal equipment. However, we determined that the District's equipment inventory records were incomplete as explained below.

The District, each school, and the Title I Director maintain equipment inventory records. District officials explained their inventory procedures, and we selectively reviewed records for Title I equipment to determine whether this condition had been corrected. A District official stated that records are not up-to-date. The District records the make, model, serial number, for whom purchased, and the purchase date but not the funding source.

The computer inventory maintained by the District for each Title I school does not always disclose that the computers were purchased with Title I funds. Some of the inventory lists contained duplicate serial numbers or the wrong serial number for computers.

The Title I Director prepared an inventory list which identified the type of computer, serial number, item number, date purchased, purchase price, and location. This inventory list is out-of-date, incomplete, and inaccurate.

According to 34 CFR Part 80.32(d)(2), a physical inventory of the property must be taken and the results reconciled with the property records at least every two years.

According to the Title I Director, the District has not completed an inventory of all equipment since 1992. We performed site visits at four Title I schools and found that the schools did not maintain an up-to-date equipment inventory. The schools relied on the central office to maintain the complete inventory. The schools do not always record on their inventory the equipment purchased with Title I funds.

Schedule 2 - Time / Equipment Inventory

Schedule 2 table is not reproduced here, but notation on table appears below:

> This schedule illustrates that the equipment inventory records of the District, each school, and the Title 1 Director contain different information and do not include all the Title 1 equipment purchased. The inventory maintained by the Title 1 Director was incomplete because only 33 of 153 items purchased were disclosed. The inventory was not current because items purchased for the 95-96 program were not disclosed even though the Inventory was dated June 19, 1996.
>
> The inventory list maintained by the Title I Director was inaccurate because 6 computers had incorrect serial numbers.

Attachment 3 - General Administration of Title I Program

We noted that general program administration needs to be strengthened.

Selection of Students with Greatest Need

According to 34 CFR Part 200.31 (b), a Local Educational Agency [LEA] that receives funds under this part shall annually assess educational needs as follows: Establish educationally related objective criteria; Uniformly apply the criteria to particular grade levels throughout the LEA; and Select for services those educationally deprived children who have the greatest need for special assistance. In general, the LEA establishes multiple, educationally related, objective core criteria to identify eligible children and schools supplement these criteria.

The District's Title I application for 1995-96 noted that the Title I schools would use the same eight criteria to determine students in greatest need of Title I services. We understood that every Title I school was to use these core criteria. However, all Title I elementary schools did not use these criteria to select Title I children. The criteria used to select Title I students at each of the five targeted assistance elementary schools are not the same for the same grade.

Variations in Personnel Costs Did Not Consider Pay Differentials

The District may consider variations in personnel costs, such as seniority pay differentials or fringe benefit differentials, as District-wide administrative costs, rather than as part of the funds allocated to school attendance areas. The District may pay the differential salary and fringe benefit costs from its administrative funds taken off the top of the District's allocation. This policy would have to be applied consistently to staff serving both public and private school children throughout the District.

The Title I Director did not consider seniority pay differentials in determining the variations in personnel costs which would be considered District-wide administrative costs for the 1995-96 program year. Instead, the Title I Director included extended day salary and fringe benefits, and the salary and fringe benefits of a Title I teacher, in determining District-wide administrative costs.

Title I Computers Not Used for Title I Purposes

The inventory list maintained by the Title I Director indicated that four computers were not used for Title I purposes. The Title I Director lent three of these computers to the Literacy Volunteers Association which placed the computers at a public library. One computer was lent to the Head Start teacher for the summer.

School Budget Plans Did Not Emphasize Title I

The Title I Director informed us that he gave each Title I school guidelines for preparing their school plan. The Guidelines did not direct the school to budget Title I funds for the benefit of Title I children. Most of the Tactics/Objectives in the budget plan of each of three targeted assistance schools appeared to benefit the entire student body and did not disclose how Title I ...

[Eau Claire Area School District Letterhead]

August 28, 1995

To: Tom Blount, Teacher representative
Pat Lightfoot, Support Staff representative
Don Lillrose, Assistant Superintendent - Personnel
John Sackett, Finance Director
Bill Klaus, Deputy Superintendent
Rick Savolainen, Title I Program Director
Al Lechleitner, principal representative
Dick Fields, Staff Development

From: Hjordy

RE: Site Plan Review: Lincoln

Meeting Date: September 28, 1995: 8:00-9:00
DP Conference Room

Attached is a copy of Lincoln's Site Plan. It is the charge of the Site Plan Review Team to review the Objective/Tactic section and look for the following:

1. Has the spirit and intent of the Title I legislation been followed?
2. Have the sites adhered to the Planning Parameters?
3. What can we do to assist the sight in removing barriers that may get in the way of implementation?
4. Are there some issues that will need to be reviewed by Employee groups, School Board or other departments in the district?

Our team needs to be positive in our approach to the Site Plan review. It is important to support the school teams in implementing school-wide efforts. We should not be a "stopper" but a group that will help to remove barriers so they

can be successful in implementing their plan. The teams will have the responsibility at the end of each year to assess their progress and determine what is working and what needs to be re-directed. The responsibility of implementing, assessing and re-directing is at the site level.

If you have any questions about our charge, please feel free to call Rick or Hjordy. Your time and willingness to be on this site review team is much appreciated. If you cannot make this meeting, please pass on your comments, verbally or in writing, to Hjordy or Rick.

cc: Dick St. Arnauld

[Wipfli Ullrich Bertelson CPAs Letterhead]

INDEPENDENT AUDITOR'S REPORT ON THE INTERNAL CONTROL STRUCTURE BASED ON AN AUDIT OF GENERAL PURPOSE FINANCIAL STATEMENTS PERFORMED IN ACCORDANCE WITH GOVERNMENT AUDITING STANDARDS

Board of Education
Eau Claire Area School District
Eau Claire, Wisconsin

We have audited the general purpose financial statements of the EAU CLAIRE AREA SCHOOL DISTRICT ("District") as of and for the year ended June 30, 1993, and have issued our report thereon dated August 23, 1993.

We conducted our audit in accordance with generally accepted auditing standards and Government Auditing Standards issued by the Comptroller General of the United States. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the general purpose financial statements are free of material misstatement.

In planning and performing our audit of the general purpose financial statements of the District for the year ended June 30, 1993, we considered its internal control structure in order to determine our auditing procedures for the purpose of expressing our opinion on the general purpose financial statements and not to provide assurance on the internal control structure.

The management of the District is responsible for establishing and maintaining an internal control structure. In fulfilling this responsibility, estimates and judgments by management are required to assess the expected benefits and related costs of internal control structure policies and procedures. The objectives of an internal control structure are

to provide management with reasonable, but not absolute, assurance that assets are safeguarded against loss from unauthorized use or disposition, and that transactions are executed in accordance with management's authorization and recorded properly to permit the preparation of general purpose financial statements in accordance with generally accepted accounting principles. Because of inherent limitations in any internal control structure, errors or irregularities may nevertheless occur and not be detected. Also, projection of any evaluation of the structure to future periods is subject to the risk that procedures may become inadequate because of changes in conditions or that the effectiveness of the design and operation of policies and procedures may deteriorate.

For the purpose of this report, we have classified the significant internal control structure policies and procedures in the following categories:

Treasury/Financing	Payroll
Revenue/Receivables/Receipts	Financial Planning and Control
Purchasing/Accounts Payable	External Financial Reporting

For all of the internal control structure categories listed above, we obtained an understanding of the design of relevant policies and procedures and whether they have been placed in operation, and we assessed control risk.

We noted certain matters involving the internal control structure and its operations that we consider to be reportable conditions under standards established by the American Institute of Certified Public Accountants. Reportable conditions involve matters coming to our attention relating to significant deficiencies in the design or operation of the internal control structure that, in our judgment, could adversely affect the District's ability to record, process, summarize, and report

financial data consistent with the assertions of management in the general purpose financial statements.

Fixed Asset Inventory

No inventory of fixed assets was taken for the year ended June 30, 1993. The District should maintain an annual inventory of fixed assets to enable the District to comply with Chapter 120 of the Wisconsin Statues, which require "annual inventory of School District property."

Appropriations

As indicated in the general purpose financial statements, certain budget categories had expenditures in excess of amounts budgeted (appropriated). The District should consider amending its budget during the year and after year-end adjustments to allow it to operate in accordance with Section 65.90 of the Wisconsin Statutes.

A material weakness is a reportable condition in which the design or operation of one or more of the specific internal control structure elements does not reduce to a relatively low level the risk that errors or irregularities in amounts that would be material in relation to the general purpose financial statements being audited may occur and not be detected within a timely period by employees in the normal course of performing their assigned functions.

Our consideration of the internal control structure would not necessarily disclose all matters in the internal control structure that might be reportable conditions and, accordingly, would not necessarily disclose all reportable conditions that are also considered to be material weaknesses as defined above. However, we believe none of the reportable conditions described above is a material weakness.

This report is intended for the information of the Board of Education, management, and the Wisconsin Department of Public Instruction. This restriction is not intended to limit the distribution of this report, which is a matter of public record.

/s/ Wipfli Ullrich Bertelson
Certified Public Accountants

August 23, 1993
Eau Claire, Wisconsin

[Eau Claire Area School District Letterhead]

May 1, 1995

Cathy Coady
EEOC
310 West Wisconsin Ave. Suite 800
Milwaukee, WI 53203-2292

RE: Sandra L. Benedict vs. Eau Claire Area School District
Chg. Number: 260-94-0791

The Eau Claire Area School District is not interested in offering a settlement or considering conciliation for any of Ms. Benedict's allegations charged under the Americans with Disabilities Act, or the Age Discrimination in Employment Act.

Sincerely,

/s/ Thomas Fiedler
Thomas Fiedler, Ed.D.
Assistant Superintendent for Personnel

inf

[State of Wisconsin]
[Department of Workforce Development Letterhead]

April 8, 1998

Sandra Benedict
3642 Livingston Lane
Eau Claire, WI 54701

James M. Ward
Weld, Riley, Prenn & Ricci
P.O. Box 1030
Eau Claire, WI 54702-1030

Re: Benedict v. Eau Claire Public Schools
ERD Case No. 199701717
EEOC Case No. 26G971140

Dear Ms. Benedict and Mr. Ward:

This is to summarize our telephone conference today, April 8, 1998.

I introduced three topics that one or both of you had raised in recent telephone calls - first, the probable absence of Mr. St. Arnauld from the hearing on April 16th due to his recent emergency bypass surgery; second, whether there are other witnesses Ms. Benedict might want to call; and third, why Ms. Benedict sent such a large volume of material to Mr. Ward as proposed exhibits for the hearing.

We did not get far in discussing these issues before it became necessary again to address the scope of the hearing. The scope of the hearing cannot be broader than the complaint itself. Paragraph (7) of the complaint in this case, which sets forth the complainant's statement, reads as follows:

> I, SANDRA BENEDICT, was disciplined or treated more harshly and retaliated against by DONNA FRIEDECK, Reading Specialist for Eau Claire Public School due to my handicap for filing a complaint against Eau Claire Public Schools previously for being treated less favorably than others because of my protected class in reference to discrimination in layoff/firing, job assignments, leave or benefits and training. I strongly believe I was retaliated against for asserting my rights under fair employment law for open records of Title I expenditures and making complaint to the U.S. Dept of Education-Inspector General WASH D.C.

The Equal Rights investigator assigned to this complaint issued two decisions on October 27, 1997. Ms. Benedict, you only appealed the decision entitled "Initial Determination--No Probable Cause."[1]

My reading of your complaint, Ms. Benedict, excluding the part about retaliation for filing a complaint with the U.S. Department of Education, is that you have alleged discriminatory treatment by the school district in the person of Donna Friedeck, primarily in retaliation for your having filed previous ERD complaints against the school district,[2] but also, perhaps, because of your age and handicap. You indicated in your complaint that the discrimination alleged first happened

---

[1] The other decision of the investigator was entitled "Preliminary Determination and Order Dismissing a Portion of the Complaint." It had to do with your allegation that the school retaliated against you because of your complaint to the U.S. Department of Education. The Equal Rights does not have jurisdiction to hear that allegation, and it will not be part of your upcoming hearing.

[2] Remember, Ms. Benedict, you do not have to prove any of the facts of these previous complaints in order to state a claim of retaliation; you only have to prove that you filed the previous complaints, that the school (here, in the person of Ms. Friedeck) treated you adversely, and that there was a causal link between your complaints and your treatment.

on March 19, 1997, and the Initial Determination makes findings about what happened that day.

Events that occurred prior to March 19, 1997 which you have alleged to be discriminatory and which have been the subject of other complaints that have already been dismissed by the Equal Rights Division's hearing section, are beyond the scope of your complaint scheduled for hearing on April 16th.

In our telephone conference we also discussed procedures and potential remedies under the state fair employment law. Ms. Benedict, it is the complainant's burden to prove discrimination. Under the state administrative process, if an investigator finds no probable cause to believe an employer violated the law, the complainant may appeal to the hearing section for a hearing on the existence of probable cause. This is the stage where we are with your complaint, Ms. Benedict. At the hearing on April 16th you will be asked to present evidence to show that probable cause exists to believe that the school violated the fair employment act as you alleged in your complaint. If I find probable cause, then another administrative hearing is scheduled, at which the complainant would have the burden of proving by a preponderance of the evidence (i.e., that it is more likely than not) that the school district violated the fair employment law as alleged. If you do not succeed at either of these steps, then the administrative law judge would issue an order dismissing the case, which you could appeal to the Labor and Industry Review Commission. If both hearings result in findings in your favor, you would be granted a remedy. In general, this would include restoration of monetary loss resulting from the specific discriminatory act(s) proven. It would not include punitive damages or compensatory damages (i.e., damages for pain and suffering, emotional distress and the like). They are not available under the state fair employment law.

As to Mr. St. Arnauld, Mr. Ward, you did not object to his being named as a witness. Ms. Benedict, you stated that you

wished to proceed with the hearing on April 16th despite Mr. St. Arnauld's probable absence. Although I did not state this during the telephone conversation, my preference would be, Ms. Benedict, if you have any thought of wanting Mr. St. Arnauld's testimony in your case, that we postpone the hearing until he is well enough to appear. Otherwise, we will be looking at two days of hearing instead of one, increasing everybody's time on this case. Also, since the Respondent is not compelled to put on a case until the Complainant completes hers, the school would not have to proceed with any of its case on the 16th if on that date you were to ask for an adjournment of your case to question Mr. St. Arnauld at a later date. I do have some additional dates within the next several weeks for which I would be available, and I would ask you both to consider them: Monday April 27, Thursday April 30, Wednesday May 6, Thursday May 7, Monday May 11, Tuesday May 12 and Wednesday May 13.

We briefly talked about your request, Ms. Benedict, to call attorney Joel Aberg as a witness because of his involvement in other complaints of yours. To the extent that you were asking that he be subpoenaed to attend, I denied your request. His involvement in other cases does not make him a competent witness in this complaint.

As to the box of potential exhibits that you sent, Ms. Benedict, I did receive my copies later today, April 8, 1998. I have not yet reviewed them, but for those that appear to deal with previous complaints I would have to hear some argument about why they are relevant to your present case before I could admit them.

As I stated to you in our telephone conference, Ms. Benedict, please consider this letter and get in touch with me by Friday, April 10, 1998 to let me know if you wish to proceed on April 16th, and if so, what you want to do about Mr. St. Arnauld's testimony, or if you want to reschedule for another day, or if

you have any other concern. My telephone number is (608) 266-6976.

Thank You.

Sincerely,

/s/ John L. Brown
John L. Brown
Administrative Law Judge

Supreme Court, U.S.
FILED
JUN 26 1998
CLERK

No. 97-1945

In The

Supreme Court of the United States

October Term, 1997

SANDRA L. BENEDICT,

Petitioner,

v.

EAU CLAIRE PUBLIC SCHOOLS, WISCONSIN EDUCATION ASSOCIATION COUNCIL, THOMAS BLOUNT, MICHAEL BURKE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS, WISCONSIN EDUCATION ASSOCIATION COUNCIL, THOMAS BLOUNT, AND MICHAEL BURKE IN OPPOSITION TO THE PETITION

JOHN D. FINERTY, JR.
(*Counsel of Record*)

KRAVIT & GASS S.C.
825 North Jefferson
Milwaukee, WI 53202-6495
(414) 271-7100

Attorney for the Respondents Wisconsin Education Association Council, Thomas Blount, and Michael Burke

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED BY RESPONDENTS

The Respondents, Wisconsin Education Association Council ("WEAC" or the "Union"), Thomas Blount and Michael Burke object to the form and substance of the "Questions Presented For Review" in the Petition for a Writ of Certiorari (the "Petition") and believe the question should be posed as follows:

> Whether the Supreme Court has jurisdiction to address Benedict's claims against WEAC, because it was not served with process, and whether there is any reason to address Benedict's claims against Blount and Burke because she voluntarily stipulated to their dismissal before the district court below.

PARTIES

The names of the parties to this case appear in the caption of the Petition.

Wisconsin Education Association Council is a private, voluntary association that provides organizational services to labor organizations that represent public school teachers within the State of Wisconsin.

Thomas Blount is an individual resident of the State of Wisconsin; he is the President of the Eau Claire Association of Educators (the "Association") and a public school teacher employed by the Eau Claire Public School District. The Association, which is not a party to this case, is a WEAC affiliate.

Michael Burke is an individual resident of the State of Wisconsin; he is an attorney employed by the Executive Director of the Northwest United Educators (the "NUE"). The NUE, which is also not a party to this case, is a labor organization that provides collective bargaining and grievance handling services to local bargaining units, such as the Association, in northwestern Wisconsin.

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OPINIONS BELOW

The February 10, 1998 Order of the United States Court of Appeals for the Seventh Circuit is reproduced in the appendix to the Petition for Writ of Certiorari at pp. A2-A21. The Order of the United States District Court for the Western District of Wisconsin dated May 7, 1997 is reproduced in the appendix to the Petition at pp. A42-A43. Benedict's complaint, and various pleadings and orders that followed, refer to the WFT (the Wisconsin Federation of Teachers) and WEAC as though they are the same entity. They are not, but the distinction is irrelevant to review because neither was served with a complaint and the district court dismissed both. The Respondents object to the inclusion of irrelevant documents in the Petition; however, those documents are of no significance for this Court's review.

JURISDICTION

Respondents WEAC, Blount and Burke object to Petitioner's jurisdictional statement which is predicated upon 28 U.S.C. § 1291.

As discussed below, Benedict's action against WEAC was dismissed without prejudice because she failed to serve the organization with process. The Court of Appeals below did not reach the merits of Benedict's claims against WEAC. Relevant to this Court's review is the Court of Appeals holding below (that Benedict did not contest) that Benedict failed to serve the Union with process and, therefore, the Court lacked jurisdiction. (Slip

Op. at p. 7, n. 1; A7). This Court likewise lacks jurisdiction.

As for Blount and Burke, Benedict abandoned her claims against them by stipulation entered in the District Court pursuant to Fed. R. Civ. P. 41(a). Benedict did not challenge that stipulation; thus, the courts below did not consider her appeal against Blount and Burke. Therefore, there is no active controversy against these defendants for this Court to review.

STATEMENT OF FACTS

The facts relevant to the merits of Benedict's claims under the Age Discrimination in Employment Act (the "ADEA"), the Americans with Disabilities Act (the "ADA") and various state statutes are set forth in the Brief in Opposition filed by the Eau Claire Public School District and the opinion of the Court of Appeals below. The courts below did not reach the merits of Benedict's claims against WEAC, Blount or Burke. The facts of this case as they relate to WEAC, Blount and Burke are set forth in the order of the Court of Appeals for the Seventh Circuit and are recited, in relevant part, as follows:

Sandra Benedict brought this lawsuit against her employer, Eau Claire Public School District ("ECPS"), alleging that ECPS violated the Age Discrimination in Employment Act of 1967 ("ADEA"), *see* 29 U.S.C. § 621 *et seq.*, the Americans with Disabilities Act of 1990 ("ADA"), *see* 42 U.S.C. § 12101 *et seq.*, and that ECPS engaged in

retaliatory conduct because she filed her claims of discrimination. Ms. Benedict also alleged that union bargaining representatives Thomas Blount and Michael Burke and the Wisconsin Education Association Council ("WEAC"), a labor organization, breached their duty of fair representation in failing to prosecute her grievances against ECPS. The District Court granted summary judgment for ECPS.

Benedict alleged that WEAC and union bargaining representatives Tom Blount and Michael Burke breached their duty of fair representation by not assisting her in prosecuting her grievances against ECPS. Benedict's action against WEAC was dismissed without prejudice because she failed to serve the organization with process. *See* Fed. R. Civ. P. 4(m); *Omni Capital International, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104-05 (1987). This Court thus lacks jurisdiction under 28 U.S.C. § 1291 to consider that claim. *See Perry R. Pennington Co. v. T.R. Miller Co.*, 994 F.2d 390, 392-93 (7th Cir. 1993). Similarly, because Benedict abandoned her claims against Blount and Burke in a stipulation entered by the District Court pursuant to Fed. R. Civ. P. 41(a), there is no need to further consider her appeal against these defendants.

SUMMARY OF ARGUMENT

The Petition should be denied because this Court lacks appellate jurisdiction over WEAC and because the Petitioner abandoned her claims, voluntarily and with full consent, against Blount and Burke.

REASONS WHY THE PETITION SHOULD BE DENIED

I. There Is No Appellate Jurisdiction Over WEAC Because WEAC Was Not Served With Process; Further, Benedict Abandoned Her Claims Against Blount And Burke By Stipulating To Dismissal, With Prejudice, Before The District Court.

A. There is no appellate jurisdiction over WEAC because Benedict did not serve the summons and complaint.

It is axiomatic that before a federal court can exercise personal jurisdiction over a defendant, the procedural requirement of service of process must be satisfied. *Omni Capital International, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104-105 (1987). Benedict does not dispute the absence of service of the summons and complaint. She does not argue that any exceptions apply or should be created. There is no appellate jurisdiction because there is no controversy over whether Benedict served WEAC. The absence of jurisdiction mandates that the petition be denied.

B. Benedict voluntarily abandoned her claims against Blount and Burke, with prejudice before the District Court.

Benedict's stipulation to dismissal of her claims against Blount and Burke was signed by her and by her attorney, and was entered by the District Court under Rule 41(a). It was therefore a wholesale abandonment of her claims – including her right to appeal. Yet, Benedict continues to argue the merits of her claims and ignores the voluntary dismissal. Benedict consented to the end of

her case against Blount and Burke so her Petition should be denied.

"[A] decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause." *Nashville, C. & S. L. Ry. v. United States*, 113 U.S. 261, 266, 5 S. Ct. 460 (1885); *see NLRB v. OCHOA Fertilizer Corp.*, 368 U.S. 318, 323, 82 S. Ct. 344 (1961) (the consent of the parties to the Board's decree "makes a significant difference," foreclosing the Court of Appeals from modifying the consent decree). Again, as with WEAC's jurisdictional objection, Benedict does not contest the voluntariness of her consent or otherwise argue an exception to affirmance of the stipulation and dismissal of her claims against Blount and Burke. *See Swift & Co. v. United States*, 276 U.S. 311, 324, 48 S. Ct. 311 (1928) (setting forth exceptions to general rule of affirming consent decrees).

II. Benedict's Claims Against WEAC, Blount And Burke Were Not Addressed By The Court Below.

This case presents no controversial legal issues: there is no appellate jurisdiction over WEAC and Benedict abandoned her claims against Blount and Burke. Benedict has never challenged these conclusions, so the courts below never reached the merits of Benedict's claims. Therefore, settled legal principles apply to preclude consideration of the merits of Benedict's claims and mandate that the Court deny the Petition.

It is only in exceptional cases "that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195, 200 (1927); *see DeShaney v.*

Winnebago County Dept. of Social Servs., 489 U.S. 189, 195 n.2 (1989) (refusing to consider argument raised for first time in petitioner's brief to Court); *Monsanto Company v. Spray-Rite Service Corp.*, 465 U.S. 752, 759 n.6, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984) (declining to consider argument neither raised nor addressed by Court of Appeals); *Brandon v. Holt*, 469 U.S. 464, 473 n.25, 83 L. Ed. 2d 878, 105 S. Ct. 873 (1985) (refusing to consider argument not addressed before Court of Appeals). The present case is not an exceptional case because there is no dispute that WEAC was not served and that Benedict voluntarily abandoned her claims against Blount and Burke.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 97-1945

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In The

Supreme Court of the United States

October Term, 1997

SANDRA L. BENEDICT,

Petitioner,

v.

EAU CLAIRE PUBLIC SCHOOLS, WISCONSIN EDUCATION ASSOCIATION COUNCIL, THOMAS BLOUNT, MICHAEL BURKE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit Court

BRIEF OF RESPONDENT EAU CLAIRE PUBLIC SCHOOLS IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW BY RESPONDENT EAU CLAIRE PUBLIC SCHOOLS

Respondent Eau Claire Public Schools objects to the "Questions Presented for Review" contained in the Petition for Writ of Certiorari, and believes the proper inquiry should be as follows:

> Whether Sandra Lea Benedict's petition for Writ of Certiorari presents any compelling reason for review of the Seventh Circuit's affirmance of a summary judgment dismissal of petitioner's claims under the Age Discrimination in Employment Act (ADEA) or under the Americans with Disabilities Act (ADA). *See*, Rule 10, Rules of the Supreme Court.

LIST OF PARTIES

Petitioner, Sandra Lea Benedict, sued the Eau Claire Public Schools (ECPS) for alleged violations of the ADEA and the ADA in the United States District Court for the Western District of Wisconsin. Petitioner also sued the Wisconsin Education Association Council (WEAC), a public teacher labor organization, Thomas Blount, a representative of petitioner's collective bargaining unit, and Michael Burke, a representative of Northwest United Educators (NUE) which is an affiliated collective bargaining agency of WEAC.

On appeal to the Seventh Circuit, the only proper parties to the case are the petitioner and ECPS. WEAC was never served with a Summons and Complaint by Ms. Benedict. Blount and Burke were dismissed from the litigation at the district court level by a written stipulation executed by petitioner.

I. OPINIONS BELOW

The Seventh Circuit's unpublished decision and order for this case is reproduced in the appendix of the Petition for Writ of Certiorari at pp. A2-A21. The relevant memoranda and orders of the United States District Court for the Western District of Wisconsin relative to summary judgment for ECPS are reproduced in the petitioner's appendix at A31-A45.

II. JURISDICTION

On February 10, 1998, the Seventh Circuit issued its decision and order in this case. On or about February 17, 1998, petitioner filed motions for rehearing to the court of appeals. Rehearing was denied by the Seventh Circuit on March 5, 1998. *See*, Petitioners's appendix at A22. The Petition for Writ of Certiorari was timely filed with the Supreme Court on or about May 28, 1998. As to ECPS only, jurisdiction of the Supreme Court is proper under 28 U.S.C. § 1254(1).

III. STATUTES INVOLVED

Petitioner's claims arise under the ADEA, *see* 29 U.S.C. § 621, *et seq.*, and the ADA, *see* 42 U.S.C. § 12101, *et seq.*

IV. STATEMENT OF THE CASE

The decision of the Seventh Circuit expressly ruled upon the petitioner's claims under the ADEA and the ADA against ECPS. There are no other parties nor are there any claims beyond those ruled upon by the court of

appeals. Accordingly, petitioner's reference to amended pleadings under Rule 15(a), F.R.C.P., equitable tolling and borrowed statute of limitations under 42 U.S.C. § 1983, removal of state administrative proceedings to Federal Court by 28 U.S.C. §§ 1441-1450, the Fair Labor Standards Act, the EPA, or the Rehabilitation Act, are neither materially germane nor otherwise relevant to the Supreme Court's review of the petition filed by Ms. Benedict. If the Supreme Court were to review the Seventh Circuit's decision in this matter, its analysis would most appropriately be focused upon petitioner's claims under the ADEA, the ADA and for alleged retaliation against petitioner because she filed claims with the Equal Employment Opportunity Commission. These are the issues which the Seventh Circuit believed were properly before it on appeal.

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

V. REASONS FOR DENYING WRIT

In all of the petition, there is no clear expression by Ms. Benedict that points with specificity to any error on the part of the Seventh Circuit in rendering its decision. Indeed, the petition raises a number of new legal issues that were never considered by the court of appeals or the district court (i.e., potential Sec. 1983 claims). It is well established that the Supreme Court rarely considers issues raised in such a fashion. *See, DeShaney v. Winnebago County Dept. of Social Services,* 48 U.S. 189, 195 n. 2 (1989).

To justify the granting of a Writ of Certiorari by the Supreme Court, the petitioner needs to show more than that she simply disagrees with the lower courts' rulings. Rule 10 of the Supreme Court Rules requires a compelling reason before review would normally be considered.

Ms. Benedict identifies no error on the part of the Seventh Circuit for the Supreme Court to correct. Nor does Ms. Benedict identify any important precedential issue (i.e., a case of first impression) which the Supreme Court needs to address. Nor does Ms. Benedict present any important issues of statutory interpretation which would require the Supreme Court's attention. No compelling reason of any kind is provided by Ms. Benedict for the Supreme Court to devote its limited resources to a review of her petition. In other words, neither the Supreme Court nor ECPS have been made aware of any compelling purpose that might be served if Ms. Benedict's petition were to be granted.

VI. CONCLUSION

Therefore, the ECPS respectfully requests that Ms. Benedict's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 97-1945

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

SANDRA LEA BENEDICT,

Petitioner,

v.

EAU CLAIRE PUBLIC SCHOOLS,
WISCONSIN EDUCATION ASS'N COUNCIL,
THOMAS BLOUNT, MICHAEL BURKE,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER FEDERAL AND STATE QUESTION CLAIMS UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) (42 U.S.C.A. 12101 et seq.) AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) (29 U.S.C.A. 621 et seq.) VIOLATES DUE PROCESS AND IS THEREFORE UNCONSTITUTIONAL.

II. WHETHER AS APPLIED IN THIS CASE THE U.S. DISTRICT COURT AND APPELLATE COURT VIOLATED DUE PROCESS RIGHTS BY INVOKING THE PRESUMPTION BY EGREGIOUS AND EXTRAORDINARY PROOF REQUIRED BY THE APPELLATE COURT AND U.S. DISTRICT COURT TO REBUT THE PRESUMPTION OF ADA AND ADEA CLAIMS IS UNCONSTITUTIONAL.

III. WHETHER AS INTERPRETED BY THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) (42 U.s.c.a. 12101 et seq.) AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) (29U.S.C.A. 621 ET SEQ.) IS REALLY A CONCLUSIVE PRESUMPTION, AND THUS, VIOLATES DUE PROCESS.

IV. WHETHER THE SUPREME COURT UPHOLDS THAT A COMPLAINT NOT BE DISMISSED FOR FAILURE TO STATE A CLAIM UNLESS IT APPEARS BEYOND DOUBT THAT NO SET OF FACTS CAN BE PROVEN IN SUPPORT OF CLAIM WHICH ENTITLES RELIEF.

V. WHETHER THE UNITED STATES COURT OF APPEALS DIVESTS THE DISTRICT COURT OF JURISDICTION OVER THOSE ASPECTS OF THE CASE INVOLVED IN THE APPEAL BY THE FILING OF A NOTICE OF APPEAL.

LIST OF PARTIES
TO THE PROCEEDINGS
IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Seventh Circuit.

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OPINIONS BELOW

The February 10, 1998 Judgment Order of the Seventh Circuit Court of Appeals, whose judgment is herein sought to be reviewed, is at No. 97-2513, is unpublished and is reprinted in Appendix A to this Petition ("Appendix A") at pp. A2. The Order of March 5, 1998 of the Seventh Circuit Court of Appeals for denial of rehearing is reprinted in Appendix A at p. A22. The Order of March 6, 1998 of the Seventh Circuit of Appeals for denial of Motion for Stay of Mandate is reprinted in Appendix A at pp. A23. The prior, Memorandum and Order of the Honorable John C. Shabaz of the United States District Court for the Western District of Wisconsin, entered March 19, 1996 at No. 95-C-568-S, is reprinted in Appendix A at pp. A31. The prior April 24, 1996 Memorandum and Order of the Honorable John C. Shabaz of the United States District Court for the Western District of Wisconsin at No. 95-C-568-S is reprinted in Appendix A at pp. A37. The prior October 2, 1996 Order of the Honorable John C. Shabaz of the United States District Court for the Western District of Wisconsin at No. 95-C-568-S is reprinted in Appendix A at pp. A40. The prior May 7, 1997 Order of the Honorable John C. Shabaz of the United States District Court for the Western District of Wisconsin at No. 95-C-568-S is reprinted in Appendix A at pp. A42. The June 17, 1997 Order of the Honorable John C. Shabaz of the United States District Court for the Western District of Wisconsin at No. 95-C-568-S is reprinted in Appendix A at p. A44. The December 5, 1996 Decision and Order of the Honorable John L. Brown, Administrative Law Judge for the State of Wisconsin, Department of Workforce Development, Equal Rights Division at ERD Case No. 199504328 and EEOC Case No. 260960026 is reprinted in Appendix A at pp. A46, along with attached Certification of the Hearing Section, Equal Rights Division, p. A55. The March 20, 1998 Order of the Honorable Jerome J. Berkowitz, Administrative Law Judge for the Social Security Administration, Office of Hearings and Appeals is reprinted in Appendix A at p. A56.

JURISDICTION

The United States Supreme Court has jurisdiction according to 28 U.S.C. 1257 which states in pertinent part: (a) Final judgments or decree rendered by the highest Court in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the grounds of it being repugnant to the constitution, treaties, or laws of the United States.

This court also has jurisdiction under 28 U.S.C. 1257 due to fact Petitioner exhausted her remedies on the issues raised by this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action was also filed pursuant to the Fourteenth Amendment of the United States Constitution and the Rehabilitation Act, 29 U.S.C.A. 794. The pertinent sections of these constitutional and statutory provisions are set forth in the Appendix A at p. A57, Writ of Certiorari.

This action was further filed pursuant to the Americans with Disabilites Act (ADA), 42 U.S.C. 12101 et. seq. and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 et. seq. The pertinent sections of 29 U.S.C.A. 623(a)(1), 29 U.S.C.A. 623(d), 42 U.S.C.A. 12111(9), 42 U.S.C.A. 12102(2), 42 U.S.C.A. 12111 (8), 42 U.S.C.A. 12111(10)(A), 42 U.S.C.A. 12112(a), 42 U.S.C.A. 12112(b)(5), and 42 U.S.C.A 12203(a) of these constitutional and statutory provisions are set forth in the Appendix A at p. A57, Writ of Certiorari.

This action was filed pursuant to 42 U.S.C.A. 1983 on the basis that the second federal policy underlying 1983 Civil Rights actions is compensation for victim who has suffered violation of his/her Civil Rights.

STATEMENT OF FACTS

Petitioner alleges that her employer Eau Claire Public Schools and WEAC Labor Union interfered with her rights as their employee to file a charge or to participate in EEOC hearings, ERD hearings, investigations, or other proceedings under the ADA, Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, or the Equal Pay Act. These are non-waivable rights built upon the premise that (a) interference with these protected rights is contrary to public policy; and (b) the anti-retaliation provisions of the civil rights statutes prohibit such conduct.

Petitioner claims that defendants have discriminated against her on the basis of her disability and age with respect to the terms, conditions, and privileges of her employment and labor organization membership as prohibited by the Americans with Disabilities Act (ADA) 42 U.S.C. 12101 et. seq. and the Age Discrimination Act (ADEA), 29 U.S.C. 621 et. seq., as well as treating her and disciplining her more harshly and retaliating against her due to her handicap for filing a complaint against her employer and her union previously for being treated less favorable than others because of her protected class in reference to discrimination in layoff/firing, job assignments, leave or benefits and training. Petitioner believes she was retaliated against for asserting her rights under fair employment law for open records of Title I with U.S. Inspector General.

SUMMARY OF ARGUMENT

Petitioner's arguments have proven that (1) Petitioner is disabled within the meaning of the ADA, and (2) Respondents discriminated against her unlawfully on the basis of her disability and age, and therefore, is liable for all of the damages she is entitled to under the law, together with court costs and attorney's fees.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES SUPREME COURT HAS JURISDICTION.

28 U.S.C. 1257 states in pertinent part:

> (a) Final judgments or decree rendered by the highest Court in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the grounds of it being repugnant to the Constitution, treaties, or laws of the United States ...

This case involves the validity of a state statute on the grounds of its being repugnant to the Constitution. Petitioner asserts that under the Americans With Disabilities Act (ADA) (42 U.S.C.A. 12101 et seq.) and the Age Discrimination In Employment Act (ADEA) (29 U.S.C.A. 621 et seq.) a conclusive presumptionby the Appellate Court to rebut ADA and ADEA claims is unconstitutional and thus, violates due process and as it was applied in this case.

Petitioner's case was dismissed on summary judgment. The appellate court, on its own, decided the case based on its definition of the quantity, and quality of proof necessary to rebut the presumption.

In a Petition for Rehearing to the appellate court, petitioner raised the issues of the unreliability of the assumptions used to determine ADA and ADEA claims in upholding a grant of summary judgment.

To uphold a grant of summary judgment, this court must view the record and all reasonable inferences from it in the light most favorable to the party opposing the

the motion, Petitioner. The court must then conclude that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. "Summary judgment is only appropriate when the record reveals that no reasonable jury could find for the moving party." McCoy v. WGN Continental Broadcasting Co., 957 F. 2d 368, 370 (7th Cir. 1992). On summary judgment motions, a court cannot make credibility determinations nor choose between competing inferences as these are functions of the jury. Sarsha v. Sears Roebuck & Co., 3 F. 3d 1035, 1041 (7th Cir. 1993).

This standard is applied with increased rigor in employment discrimination cases, where intent and credibility are the central issues. Id. at 1038. "Because evidence directly supporting a claim of intentional discrimination is rare, affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." Courtney v. Biosound, Inc., 42 F. 3d 414, 418 (7th Cir. 1994). The nonmoving party's own affidavit or deposition can constitute affirmative evidence to defeat a summary judgment motion. Furthermore, a grant of summary judgment which turns on the issue of discriminatory intent must be approached with extra caution. Id. at 423.

In this case, Petitioner has provided sufficient evidence to defeat defendant's motion for summary judgment. Specifically, the affidavits and supporting documentation offered by Petitioner has raised material issues of fact regarding alleging discrimination have to be determined and it appears that summary judgment did not get at the facts per se. Therefore, a trial is needed to substantiate the disputed facts.

Petitioner believes that summary judgment to be granted for defendant's counterclaim that where the genuine issues of fact that existed and still continues to exist is irrelevant and immaterial appears to be incorrect since it assists in determining whether a violation of the applicable Federal Act has occurred and will violate Petitioner's due process as it applies to this case.

Plaintiff believes that summary judgment is not a substitute for a court or jury trial of any issue of material fact that is subject of a genuine dispute. See 56.04(1), 56.17 (18), 56.18, 56.19, 56.20.

The jurisdiction of the United States Supreme Court does not depend on whether the state court addressed the federal question. It is enough that the federal claim was made and not accepted. (Lynk v. La Porte Superior Court No. 2, 789 F.2d554 (7th Cir. 1986). Furthermore, when the Court of Appeals for the Seventh Circuit denied a Petition for Review, it is to be assumed that the court has been given fair opportunity to review the merits of the petitioner's claim, for purposes of exhaustion of state court remedies. (Roman v. Estelle, 917 F.2d 1505 (9th Cir. 1990). The issues have been raised, preserved, and passed upon by the State Administrative Law Judge in his Decision and Order stating:

Meanwhile, on October 2, 1996 the federal district court issued its jugment dismissing the federal lawsuit, and Benedict is now pursuing an appeal to the Seventh Circuit.

Based on the dismissal of the federal claims by the federal district court, the school district seeks to have the ERD complaint dismissed on grounds of resjudicata, or claim preclusion.

As to whether there has been a judgment on the merits, it appears that the granting of a summary judgment in the school district's favor went to the merits of Benedict's case, even though it resulted in a pretrial disposition. There is a clear consensus in both the Labor and Industry Review Commission and the Wisconsin appellate courts that a judgment on the merits does not require a trial. Maguire v. Marquette University (LIRC, 08/18/88); Byrne v. West Allis-West Milwaukee School District (LIRC, 09/18/91); Bourque v. Wausau Hospital Center (LIRC, 04/02/92); DePratt, supra at 311. In Maguire, LIRC looked to the Seventh Circuit for guidance in determining what a judgment on the merits was for purposes of res judicata.

The Order of Judge Shabaz granting summary judgment in Petitioner's federal case was clearly based on an assessment of Petitioner's legal rights, and was not a matter of practice, procedure, jurisdiction or form. It was, therefore, a judgment on the merits for purposes of res judicata.

This court has jurisdiction under 28 U.S.C. 1257 because Petitioner exhausted her state court remedies on the issues raised by this petition. Therefore, Respondent's claim that this court does not have jurisdiction of this petition is erroneous.

II. THE STATE COURT'S DECISION IS VALID IF, AND ONLY IF, THE AMERICANS WITH DISABILITIES ACT ("ADA"), 42 U.S.C. 12101 ET. SEQ. AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT ("ADEA"), 29 U.S.C. 621 ET. SEQ.IS VALID.

Considering that the Wisconsin Fair Employment Act and Title VII serve identical purposes, it is appropriate to consider federal decisions, although such decisions are not binding and must be disregarded if they conflict with our legislature's intent in enacting the Wisconsin Fair Employment Act. Marten Transport v. DILHR, 176 Wis. 2d 1012, 501 N.W. 2d 391 (1993).

As a general guidance principle, Wisconsin courts look to federal decisions interpreting Title VII for guidance in applying the state employment law. However, the state court must construe Wisconsin statutes as it is believed the Wisconsin legislature intended, regardless of how Congress may have intended that comparable statutes be interpreted. Moore v. LIRC, 175 Wis. 2d 561, 499 N.W. 2d 289 (Ct. App. 1993). Wisconsin courts have at times looked to federal employment law for guidance in considering discrimination claims under the Wisconsin Fair Employment Act.

Remedies under Title VII and the Wisconsin Fair Employment Act are to be pursued separately and, in applying the WFEA, the provisions of Title VII should not be automatically incorporated. AMC v. DILHR (Bartell), 101 Wis. 2d 337, 305 N.W. 2d 62 (1981).

The decision reached by a federal court in a Title VII suit is not res judicata in a complaint filed under the Act. The statutes express an intent to accord parallel or overlapping remedies and the identity of issues necessary for res judicata is absent when the two laws have not been similarily interpreted. Ruberstein v. LIRC (UW-Board of Regents) (Dane Co. Cir. Ct., 08/15/80).

Petitioner is challenging the district court's dismissal of her claims against WEAC Labor Union for failure to serve the Summons and Complaint. There are claims pending against WEAC that can provide a basis for appeal. Since Attorney Arellano never amended the original complaint, Petitioner submitted Motion Pursuant to Rule 12(b)(6) or 12(c) Federal Rules of Civil Procedure and Motion for Rule 42(b). Since WEAC's dismissal was without prejudice, WEAC should not be dismissed from this appeal because a basis exists for the appeal.

There are numerous reasons why Blount and Burke need to be included in this case. (1) They were named in the Summons and Complaint and served in a timely fashion (see Order dated February 9, 1996). Attorney Arellano proposed a Stipulation to Dismiss Blount and Burke from this case, with prejudice and without costs. Petitioner objected to this Stipulation and refused to sign it in March of 1996 and requested that Attorney Arellano dismiss without prejudice. Attorney Arellano stated to Petitioner that it would be taken up in a different forum and he would only continue as Petitioner's Attorney if it were signed.

A Motion For Appeal by Petitioner and A Notice of Apeeal *Interlocutory* was filed on May 20, 1996. On May 22, 1996, an order was issued that Petitioner's appeal was premature and would not proceed (filed 5-21-96). A Notice of Appeal by Petitioner was filed by Attorney Thomas Arnot on May 22, 1996 with no fee paid, no Docketing Statement filed (96-2300). On May 30, 1996 a Stipulation and Order For Dismissal of Thomas Blount and Michael Burke was mailed by Circuit Court. On June 19, 1996, an Order was issued from the United States Court of Appeals that Appeal Case (96-2275) was dismissed.

Petitioner believes that according to Espinueva v. Garrett, 895 F2d. 1164 (7th Cir. 1990); Cir. R. 3(c), 28(b) and (c), every litigant has an obligation to bring both appellate and district court jurisdictional problems to the court's attention.

In Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982); Ced's Inc., filing a Notice of Appeal divests that district court of jurisdiction over those aspects of the case involved in the appeal. Since the Notice of Appeal by Petitioner was docketed on May 20, 1996, Petitioner believes and interpretes the Voluntary Dismissal of Blount and Burke signed by the district judge, Honorable John C. Shabaz to be considered null and void due to the fact that the district court did not retain the jurisdiction, so the court surrendered its jurisdiction over Petitioner's claims against Blount and Burke when it was signed in the May 30, 1996 Order. See McCall-Bey v. Franzen, 777 F. 2d. 1178, 1184 (7th Cir. 1985).

Petitioner believes that according to FRAP 42 Voluntary Dismissal in the District Court, if an appeal has been docketed, the appeal may not be dismissed by the district court upon the filing in that court of a stipulation for dismissal signed by all parties of which Attorney Joel Aberg never did sign, or may not upon motion and notice by the appellant.

Petitioner believes that according to FRAP 42 Voluntary Dismissal in the Court of Appeals, that the parties to an appeal or other proceeding such as ERD proceedings must sign and file with the clerk of the court of appeals an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and must be agreed upon by the parties or fixed by the Court of Appeals. No agreement existed that was signed or filed with the clerk of the Court

of Appeals nor did Petitioner receive notification from the clerk of the Court of Appeals that the case was dismissed due to the fact that as per Order from United States Court of Appeals dated September 18, 1996, the following reads:

> At the time the notice of appeal was filed, the case against defendants Tom Blount and Michael Burke was still proceeding before the District Court. Accordingly, the subsequent dismissal of those two defendants did not cure the jurisdictional defect to Federal Rule Appellate Procedure 4(a)(2), as the District Court Order dismissing the two defendants was both announced and entered on the court's docket after the notice of appeal had been filed.
>
> The court also notes that it is unclear whether the claims against the defendants, other than Eau Claire Schools, Mr. Blount and Mr. Burke have been resolved. This appeal is therefore premature and is DISMISSED for lack of jurisdiction.

Petitioner believes that Blount, WEAC Union President and Burke, NUE Attorney for WEAC Union were WEAC Union since pro se litigant understood that these individuals were professionals with knowledge of Union law and/or procedures. Therefore, Petitioner still contends that since proof of service for Tom Blount and Michael Burke which are officers of the WEAC Union default judgment should be entered against them for not responding to Petitioner's complaint which was served on these defendants on November 29, 1995. The Order was dated on February 9, 1996. On February 8, 1996 Petitioner moved for default against the WEAC Labor Union.

Petitioner believes that the Stipulation did not waive any right Petitioner had to continue litigation against Blount and Burke or to object to their dismissal now due to the fact that the district court did not retain jurisdiction, so the court surrendered jurisdiction over Petitioner's claims against Blount and Burke when it signed the May 30, 1996 Order. Petitioner objected to their dismissal before, objects to

their dismissal now and believes the Stipulation to be null and void due to the circumstances of Attorney Arellano's withdrawal of counsel.

CONCLUSION

Petitioner believes that the District Court of Appeals retained jurisdiction and still continues this jurisdiction. Further, the doctrine of res judicata does not bar Petitioner's claims against Blount and Burke due to the stipulated dismissal because the parties to an appeal or other proceeding such as ERD Proceedings must be signed and filed with the clerk of the court of appeals an agreement that the proceeding be dismissed, specififying the terms as to payment of costs, and must pay whatever fees are due, the clerk must then enter the case dismissed, but no mandate or other process shall issue without an order of the court. No agreement existed that was signed or filed with the clerk of the Court of Appeals.

Petitioner objects to Blount and Burke's request for their attorneys' fees for Attorney John Finerty as well as with Eau Claire Public Schools Attorney Joel Aberg and Petitioner's Attorneys' Victor Arellano and Thomas Arnot as their sanctions against Petitioner due to the following reasons: (1) When the original stipulation was signed, Petitioner did not promise to end her case against Blount and Burke due to the many claims which were still unclear and pending. See letter to Attorney Arellano from Petitioner dated June 13, 1996 NOT abandoning WEAC Union claims. (2) Petitioner continues to litigate against Blount and Burke even after the appeal was filed; (3) Petitoner has also refused to take steps necessary to dismiss them from further litigation even after Blount and Burke offered another stipulation. Petitioner should not have to pay Blount's or Burke's attorneys' fees because no promise was breached due to the fact that the district court did not even have jurisdiction over the case because an appeal had already been docketed and too many issues remained unresolved.

For these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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